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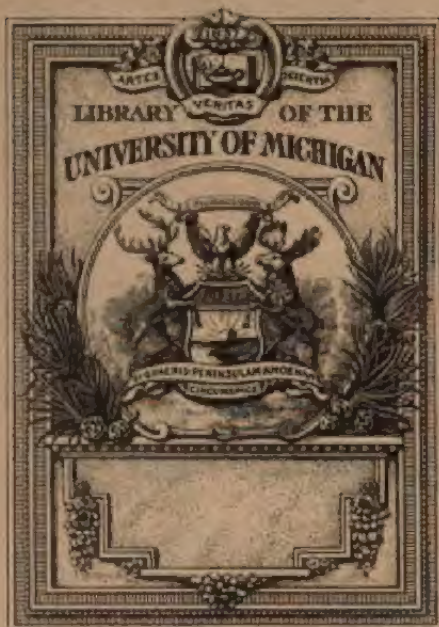
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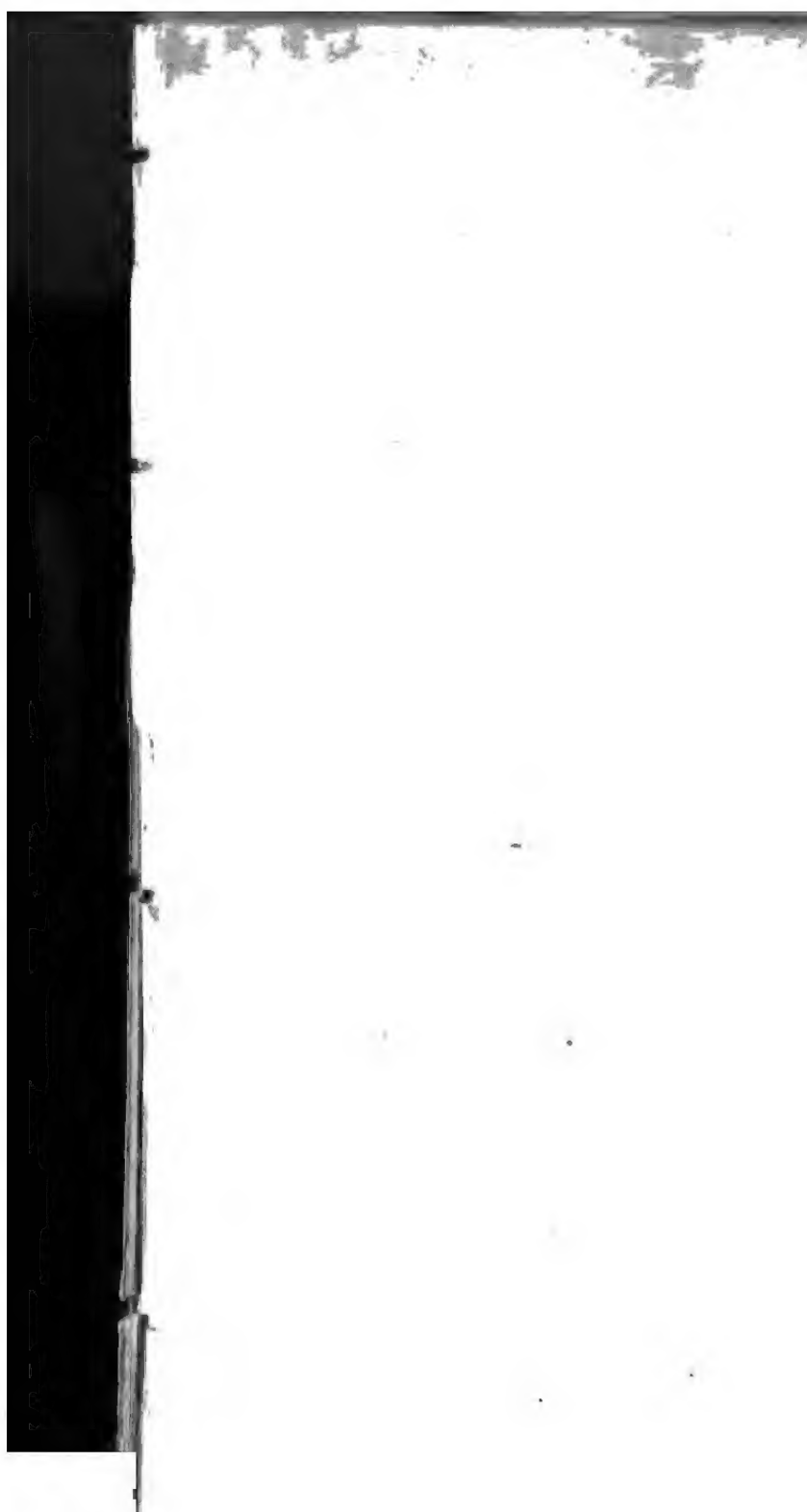


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A DIGEST OF OPINIONS

OF THE

JUDGE-ADVOCATES GENERAL OF THE ARMY,

ORIGINALLY COMPILED BY

COLONEL W. WINTHROP,  
ASSISTANT JUDGE-ADVOCATE GENERAL.

---

REVISED EDITION

(INCLUDING OPINIONS TO JANUARY 1, 1901),

BY

MAJOR CHARLES McCLURE,  
JUDGE-ADVOCATE OF VOLUNTEERS, CAPTAIN, 18TH INFANTRY.

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JUDGE-ADVOCATES GENERAL OF THE ARMY.

Name.	From—	To—
( <sup>1</sup> )		
Holt, Joseph.....	Sept. 3, 1862	Dec. 1, 1875
Dunn, Wm. M.....	Dec. 1, 1862	Jan. 22, 1881
Swain, David G.....	Feb. 18, 1881	Jan. 3, 1895
Lieber, G. Norman <sup>2</sup> .....	Jan. 3, 1895	

<sup>1</sup> Capt. J. F. Lee was appointed "Judge-Advocate of the Army" under § 4 of the Act of March 2, 1849, and served as such until September 3, 1862.

<sup>2</sup> General Lieber was "Acting Judge-Advocate General" from July 25, 1884, to January 3, 1895.

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## P R E F A C E .

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The last edition of this work was issued in 1895. Since then many new and important questions have arisen and have been referred to the Judge-Advocate-General's Office. For the purpose of incorporating the opinions on these questions, as well as to verify where necessary, revise the syllabi of the last edition, omitting as are not applicable to existing conditions, it has been deemed advisable to issue this revised edition. While the text does not include cases subsequent to January 1, 1901, necessary additions to the footnotes have been made to cover the time the work has been passing through the press.

WASHINGTON, D. C., *April 30, 1901.*

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The references or citations in the text refer to the record of the Bureau, consisting of permanent folios, press books, and records. The volumes of the permanent folios are designated in Roman numerals, those of the press books in Arabic, and the cards by number. The month and year printed in italics after a citation refer to the time the opinion was given.





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## A.

### ARTICLES OF WAR.

SECTION 1342, R. S. The armies of the United States shall be governed by the following rules and articles. The word officer, as used therein, shall be understood to designate commissioned officers, the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.

#### FIRST ARTICLE.

Every officer now in the Army of the United States shall, within six months from the passing of this act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles.

#### SECOND ARTICLE.

These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation, in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war." This oath may be taken before any commissioned officer of the Army.

SEE ENLISTMENT.

#### THIRD ARTICLE.

Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated person, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.

SEE ENLISTMENT.

#### FOURTH ARTICLE.

No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field-officer of the regiment to which he belongs, or

by the commanding officer, when no field-officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.<sup>1</sup>

#### SEE DISCHARGE.

<sup>1</sup>The 4th Article of War prescribes that "no enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present," &c. In the corresponding Article (the 11th) of the Articles of War of 1806 the language was:

"After a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge granted to him shall be sufficient which is not signed by a field officer of the regiment to which he belongs or commanding officer when no field officer of the regiment is present," &c.

The Article of 1806 was almost word for word a repetition of Article 2 of Section III of the Articles of 1776, as the latter was of Article 2 of Section III of the British Articles of 1774, from which the American Articles were copied. Among the offences made punishable by the British Mutiny Act of 1774 is found a soldier's listing himself "in any other regiment, troop, or company, without a discharge produced, in writing, from the colonel, or, in his absence, the field officer commanding in chief the regiment, troop, or company in which he last served as a listed soldier—" which will be recognized as relating to the same subject with our present 50th (formerly 22d) Article of War.

This provision of the Mutiny Act can be traced back to 1716, when it appeared in the following words: "Or being a soldier actually listed in any regiment shall list himself into any other regiment without a discharge from the first regiment." In 1717 it was: "Or being a soldier actually listed in any regiment shall list privately in another without discharge." The Article of War at this time (1717) was as follows:

"No Non-commission Officer, or Soldier, shall leave his Troop or Company, and enlist himself in any other Regiment, Troop, or Company, without a Discharge from the Commanding Officer of the Regiment in which he last served under Pain of being reputed a Deserter, and suffering Death for it, or such other Punishment as a Court-Martial shall inflict.

"And in case any Officer shall knowingly receive, or entertain, any such Non-commission Officer or Soldier; upon Proof made thereof before a General Court-Martial, he shall be cashiered:

"Nor shall any Discharge granted to any Non-commission Officer, or Soldier be allowed of as sufficient, unless signed by a Field Officer of the Regiment whence such Soldier was dismissed."

This appears to have been the first Article of War which required a discharge in writing. (Clode Mil. & Mar. Law, 2d Ed. p. 260, n.) In the Articles of War of William and Mary, of 1692, there was an article which read as follows:

"No commission officer after enrollment and being mustered shall be dismissed or cashiered without order from His Majesty; the General, or Commander in Chief for the time being, or a General Court-Martial. But the Captains with the approbation of their Colonels or of the Governors of the Garrison, where they are, may discharge any non-commission officer or private soldier when they find cause, taking other non-commission officer or private soldier in their places; Provided that such Colonel or Governor shall forthwith certify the same to the Commissary-General of the Musters, that (by their approbation) such non-commission officers or soldiers were discharged, and others taken in their places respectively, and in Quarters and Garrisons where there are only single troops, or companies, the Captains' Certificates are forthwith to be sent and accepted by the Commissary-General, expressing the day of each non-commission officers and soldiers discharge or death, and who hath been entertained in his place."

This article contained no requirement of a discharge in writing.

In a celebrated case—*Grant v. Gould*—decided in 1792, Lord Loughborough said: "A person in pay as a soldier is fixed with the character of a soldier, and if once he becomes subject to the military character, he never can be released, but by a regular

## FIFTH ARTICLE.

Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster, and punished accordingly.

## SIXTH ARTICLE.

Any officer who takes money, or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster rolls, shall be

discharge." By "regular discharge" it has been understood that Lord Loughborough meant discharge in writing. Accepting this as correct, there is an important fact to be taken into consideration in connection with Lord Loughborough's ruling, namely that at that time, as well as in 1717, when what was probably the original article was adopted, enlistments were for life. Under Queen Anne a three years' term was generally under the special circumstances of 1745 men were enlisted for two years; and in 1759 and 1775 the term was three years, or till the end of the war. (Army Book of the British Empire, p. 17.) And again in 1793 enlistments were for a limited time. But in 1792, as well as in 1717, they were for life, and it was with reference to this fact that Lord Loughborough's frequently cited decision was rendered. It might be held that on account of this fact a peculiar meaning attached to the Article of War which could not be given to it when enlistments were for limited terms. Clode says: "It must not be supposed that the 'discharge' is the only test of status. It was held so to be in *Grant v. Claid*, but then the enlistment being for life, the onus of proof rested on the enlisted soldier to prove his discharge." (Clode, p. 200.) In speaking of the "discharge" as a test of status he meant the discharge in writing or certificate of discharge.

The present law and practice in regard to this subject in Great Britain is thus explained in the "British Manual of Military Law," issued from the War Office:

"The terms of the enlistment of a soldier, since he has been enlisted directly by the Crown, have always been to serve the Sovereign so long as his services are required, within the period for which he agrees to serve, consequently the Sovereign has always had power to discharge the soldier. But a soldier cannot be discharged except by or for the Sovereign or by statutory power, such as the sentence of a court martial, to which is added in the Army Act, an 'order of the competent military authority.'

"A soldier on his discharge is entitled to receive a certificate of discharge, so as to show that he is properly discharged and is not a deserter."

This clearly shows the difference between the act of discharge and the certificate of discharge, and may be accepted as a correct statement of the law, except perhaps when enlistments were for life. The history of the article does not therefore require the construction that the delivery of a certificate of discharge is necessary to a valid discharge and that a soldier can not get out of service without a written discharge. Nor will an application of the well-established rules of construction lead to such a conclusion. Whatever may have been the meaning of the article when the term of service was for life, it seems clear that when the enlistment is for a term of years only, and the soldier, therefore, has a legal right to his discharge on the expiration of the term, this right can not be set at naught by his forcible retention in the service. If it should be attempted he would be protected by the Federal civil courts, who would not hesitate to release him from the military service on a writ of *habeas corpus*, without any regard to a military discharge.

But the military discharge in writing is presented as a regular procedure in terminating the service, and its issuance is, therefore, an act done in the performance of a public duty; and the most reasonable construction of the 4th Article of War is that it is a direction as to the manner of performing a public act, and that, in the a sense of language making it impossible to give it this meaning, it is to be regarded as directory only.

For the foregoing reasons and in consideration of long-established practice, *held*, that a certificate of discharge is not necessary to a discharge, but that a soldier may be discharged without a certificate or before he is furnished with a certificate, upon notice actual or constructive, and that when volunteers are mustered out it is that act that separates them from the service. From report of Judge-Advocate General, January 2, 1901. (See Carl 9556—W. D. Cir., Feb. 15, 1901.)

dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

#### SEVENTH ARTICLE.

Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who, through neglect or design, omits to send such returns, shall, on conviction thereof, be punished as a court-martial may direct.

#### EIGHTH ARTICLE.

Every officer who knowingly makes a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop, or company, or garrison under his command; or of the arms, ammunition, clothing, or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.

1. This article refers only to returns made by certain *commanders* as such. It is only *as commander* of a regiment, company, or garrison that an officer can be made amenable to a charge under the Article: an officer not exercising one of these commands is not within its terms.<sup>1</sup> XXX, 598, *August, 1870*; XXXII, 575, *May, 1872*; XXXIII, 188, *July, 1872*.

2. The "returns" indicated in the Article can scarcely be said to include returns of *funds*; what is contemplated being mainly returns of the *personnel* or *materiel* of the command. A false return of a company fund would more properly be charged under another Article, as the 61st or 62d. XXXVIII, 526, *March, 1877*.

#### NINTH ARTICLE.

All public stores taken from the enemy shall be secured for the service of the United States; and for neglect thereof the commanding officer shall be answerable.

3. This provision is in accordance with the principle of the law of nations and of war, that enemy's property duly captured in war becomes the property of the government or power by whose forces it is taken, and not that of the individuals who take it.<sup>2</sup> "Private persons cannot capture for their own benefit."<sup>3</sup> Military stores taken

<sup>1</sup> See, as sustaining the text, G. C. M. O. 12, 18, War Dept., 1872, and 36, of 1877.

<sup>2</sup> United States v. Klein, 13 Wallace, 128, 136; Decatur v. United States, Devereux (Ct. Cla.), 110; White v. Red Chief, 1 Woods, 40; Branner v. Felkner, 1 Heisk., 232; Worthy v. Kinamon, 44 Ga., 299; Huff v. Odom, 49 id., 395; 13 Opins. At. Gen., 105; Hough (Practice), 329, 330; G. O. 54, Hdqrs. of Army, Mexico, 1848; G. O. 21, War Dept., 1848; do. 64, 107, id., 1862. And see also Lamar v. Browne, 2 Otto, 187, 195, in regard to the same principle as illustrated by the Captured and Abandoned Property Act of March 12, 1863.

<sup>3</sup> Worthy v. Kinamon, *supra*.

from the enemy, becoming upon capture the property of the United States, Congress, which, by the Constitution,<sup>1</sup> is exclusively vested with the power to dispose of the public property, as well as to make rules concerning captures on land and water, can alone authorize the sale or transfer of the same. An officer or soldier of the army who assumes of his own authority to appropriate such articles renders himself chargeable with a military offence.<sup>2</sup> 11, 41, *February, 1863.*

#### TENTH ARTICLE.

Every officer commanding a troop, battery, or company, is charged with the arms, accoutrements, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service.

#### ELEVENTH ARTICLE.

Every officer commanding a regiment or an independent troop, battery, or company, not in the field, may, when actually quartered with such command, grant furloughs to the enlisted men, in such numbers and for such time as he shall deem consistent with the good of the service. Every officer commanding a regiment, or an independent troop, battery, or company, in the field, may grant furloughs not exceeding thirty days at one time, to five per cent of the enlisted men, for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer of a regiment, commanding any troop, battery, or company not in the field, or commanding in any garrison, fort, post, or barrack, may, in the absence of his field officer, grant furloughs to the enlisted men, for a time not exceeding twenty days in six months, and not to more than two persons to be absent at the same time.

#### TWELFTH ARTICLE.

At every muster of a regiment, troop, battery, or company, the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent noncommissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster rolls, shall be transmitted by the mustering officer to the Department of War as speedily as the distance of the place and muster will admit.

#### THIRTEENTH ARTICLE.

Every officer who signs a false certificate, relating to the absence or pay of an officer or soldier, shall be dismissed from the service.

4. *Held*, that the mere signing, by an officer, of a voucher for his pay, before the last day of the month for which it was due, did not

<sup>1</sup> Art. I, Sec. 8, cl. 11; Art. IV, Sec. 3, par. 2.

<sup>2</sup> See, in this connection, § 5313, Rev. Sts.

constitute an offence of the class intended to be made punishable by this Article.<sup>1</sup> XXXIII, 333, *September, 1872*.

#### FOURTEENTH ARTICLE.

Any officer who knowingly makes a false muster of man or horse, or who signs, or directs, or allows the signing of any muster roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses, before a court-martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

#### FIFTEENTH ARTICLE.

Any officer who, willfully or through neglect, suffers to be lost, spoiled, or damaged, any military stores belonging to the United States, shall make good the loss or damage, and be dismissed from the service.

#### SIXTEENTH ARTICLE.

Any enlisted man who sells, or willfully or through neglect wastes the ammunition delivered out to him, shall be punished as a court-martial may direct.

#### SEVENTEENTH ARTICLE.

Any soldier who sells, or through neglect loses or spoils, his horse, arms, clothing, or accoutrements shall be punished as a court-martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him.

5. This Article is quite independent of the regulations contained in Art. LX, A. R., relating to boards of survey. The latter pass upon questions of *pecuniary responsibility* for the loss, &c., of public property. The court martial, under this Article, simply imposes *punishment*.<sup>2</sup> XXXVII, 352, *February, 1876*; 59, 196, *April, 1893*.

6. The description, "*his clothing*," refers to articles thereof which are regularly issued to the soldier for his use in the service and with the safe-keeping of which he is charged. His property in them is qualified by the trust that he cannot dispose of them while he is in the military service, and can only use them for military purposes.<sup>3</sup> 59, 196, *April, 1893*.

7. Only three offences are made punishable by this article—selling, through neglect losing, and through neglect spoiling, the property named therein. Any other form of wrongful disposition should be

<sup>1</sup>See G. C. M. O. 28, War Dept., 1872. But as to whether it is a sufficient defence to a charge under this Article that the accused, in the absence of due inquiry, believed the certificate to be true, see Samuel, 298, and O'Brien, 302.

<sup>2</sup>Where a *trial* is had, the proceedings of a board of survey, already ordered in the same case, will not be competent evidence to prove the fact of the loss, &c., charged. G. C. M. O. 45, Dept. of the Missouri, 1877; do. 15, Dept. of Texas, 1877.

<sup>3</sup>See ruling of reviewing officer in G. O. 35, Dept. of the East, 1869; and see also do. 31, Dept. of the South, 1877; G. C. M. O. 15, Dept. of Texas, 1880; all sustain the text.

made the subject of a charge under Article 60 or Article 62. 26, 238, *August, 1888.*

8. Improper dispositions of property in the charge and use of soldiers, other than the dispositions indicated in this article will in general properly be charged under Article 62.<sup>1</sup> Likewise the selling, through neglect losing &c., by soldiers, of property issued to them, but not mentioned in Article 17, should be charged under Article 62. Thus *held* that a selling or losing of the following articles was not punishable under Article 17, but under Article 62, viz., sheets, pillows, pillow-cases, mattress covers, shelter tent, barrack bag, great-coat-strap, tin cup, spoon, knife, fork, meat ration can, cartridges. 17, 119, *May, 1887*; 21, 151, *December, 1887*; 52, 245½, *February, 1892.*

9. That an accused did "Unlawfully dispose of," or "otherwise unlawfully dispose of" clothing, arms, &c. is not a proper form of allegation in a specification or charge under this article. 58, 139, *February, 1893*; 65, 384, *July, 1894.*

10. A charge or specification under this article should not be expressed in the *alternative*—as that the accused "did sell *or* through neglect lose" &c. The selling, through neglect losing, and through neglect spoiling are distinct offenses and should be so charged. 26, 35, 119, *November, 1888*; 29, 162, *January, 1889*; 30, 83, *February, 1889*; 51, 343, *January, 1892*; 58, 139, *February, 1893*; 62, 449, *December, 1893*; 65, 384, *July, 1894.*

11. Clothing issued and charged to a soldier is not now (as it was formerly) regarded as remaining the property of the United States. It is considered as becoming, upon issue, the property of the soldier, although his use of it is, for purposes of discipline, qualified and restricted. Thus he commits a military offence by disposing of it as specified in this Article, though the United States may suffer no loss. 50, 196, *April, 1893.*

12. The present Seventeenth Article (as amended by the act of July 27, 1892) does not authorize a stoppage or forfeiture of pay to reimburse the United States. The stoppage which was enjoined by the old form of the Article is dropped entirely from the present statute. The latter provides for punishment only—does not provide any means of reimbursing the appropriation out of which the lost, &c., property was paid for, or of repairing the loss or damage as such. So, *held*, that a sentence, upon a conviction under this Article, which adjudged a stoppage of pay "to reimburse the United States for the value of the

<sup>1</sup> As the pawning of a revolver. G. C. M. O. 77, Dept. of the Missouri, 1874. So, the gambling away of clothing. G. C. M. O. 41, Dept. of Texas, 1873. So, the spoiling by a bugler of his bugle. G. C. M. O. 36, War Dept., 1876.

<sup>2</sup> See § 111, p. 18, Court-Martial Manual of 1901.



clothing alienated," was unauthorized and inoperative. 59, 196, *April, 1893*; Cards 7814, *December, 1894*; 1068, *February, 1895*.

#### EIGHTEENTH ARTICLE.

Any officer commanding in any garrison, fort, or barracks of the United States who, for his private advantage, lays any duty or imposition upon, or is interested in, the sale of any victuals, liquors, or other necessaries of life, brought into such garrison, fort, or barracks, for the use of the soldiers, shall be dismissed from the service.

#### NINETEENTH ARTICLE.

Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.

13. When a trial of an officer or soldier has been resorted to under this Article, it has usually been on account of the use of "contemptuous or disrespectful words against the President," or the government mainly as represented by the President. The deliberate employment of denunciatory or contumelious language in regard to the President, whether spoken in public, or published, or conveyed in a communication designed to be made public, has, in repeated cases, been made the subject of charges and trial under this Article;<sup>1</sup> and, where taking the form of a hostile arraignment, by an officer, of the President or his administration, for the measures adopted in carrying on the civil war,—a juncture when a peculiar obedience and deference were due, on the part of the subordinate, to the President as executive and commander-in-chief,—was in general punished by a sentence of dismissal. V, 491, *December, 1863*; XX, 516, *April, 1866*. On the other hand, it was held that adverse criticisms of the acts of the President, occurring in *political discussions*, and which, though characterized by intemperate language, were not apparently intended to be disrespectful to the President personally or to his office, or to excite animosity against him, were not in general to be regarded as properly exposing officers or soldiers to trial under this Article. To seek indeed for ground of offence in such discussions would ordinarily be inquisitorial and beneath the dignity of the Government. V, 491, *December, 1863*.

#### TWENTIETH ARTICLE.

Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.

<sup>1</sup> See cases in G. C. M. O. 43, War Dept., 1863; G. O. 171, Army of the Potomac, 1862; do. 23, *id.*, 1864; do. 52, Middle Dept., 1863; do. 119, Dept. of the Ohio, 1863; do. 33, Dept. of the Gulf, 1863; do. 68, Dept. of Washington, 1864; do. 86, Northern Dept., 1864; do. 1, *id.*, 1865; do. 29, Dept. of N. C., 1865.



14. The disrespect here indicated may consist in acts or words;<sup>1</sup> and the particular acts or words relied upon as constituting the offence should properly be set forth in substance in the specification.<sup>2</sup> It must be shown in evidence under the charge that the officer offended against was the "commanding officer" of the accused.<sup>3</sup> The commanding officer of an officer or soldier, in the sense of this Article, is properly the superior who is authorized to require obedience to his orders from such officer or soldier, at least for the time being. Thus where a battalion was temporarily detached from a regiment and placed under the orders of the commander of a portion of the army distinct from that in which the main part of the regiment was included, *held* that it was the commander of this portion who was the commanding officer of the detachment; and that the use by an officer of such detachment of disrespectful language in reference to the regimental commander (who had remained with and in command of the main body of the regiment) was properly chargeable not under this Article, but rather under the 62d, XVIII, 407, *November, 1864*.

15. *Held* that disrespectful language used in regard to his captain by a soldier, when detached from his company and serving at a hospital, to the surgeon in charge of which he had been ordered to report for duty, was an offence cognizable by court martial, not under this Article but under Art. 62. VI, 53, *March, 1864*.

#### TWENTY-FIRST ARTICLE.

Any officer or soldier who, on any pretense whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death, or such other punishment as a court-martial may direct.

16. The term *officer* ("superior officer") in this as in all other articles of war means commissioned officer.<sup>4</sup> IX, 90, *May, 1864*.

17. To justify a conviction of the capital offence of offering violence against a superior officer, it should be made to appear in evidence that the accused knew or believed that the person assaulted was in fact an officer in the army and was his "superior" in rank.<sup>5</sup> XXIX, 485, *December, 1869*.

18. Under a charge of a violation of this Article, in offering violence to a superior officer, it should be alleged and proved that the officer

<sup>1</sup>G. O. 44, Dept. of Dakota, 1872. And see G. C. M. O. 28, War Dept., 1875; G. O. 47, Dept. of the Platte, 1870.

<sup>2</sup>G. C. M. O. 35, Dept. of the Missouri, 1872.

<sup>3</sup>G. O. 53, Dept. of Dakota, 1871.

<sup>4</sup>See the provision, introductory to the Articles of War, of Sec. 1342, Rev. Sts., in which it is specified that "the word *officer*, as used therein, shall be understood to designate commissioned officers."

<sup>5</sup>See G. O. 34, Dept. of Virginia, 1863.

assaulted was at the time "in the execution of his office." I, 462, *December, 1862*; IX, 90, *May, 1864*.

19. In charging a striking or doing of violence to a superior officer under this Article, it is allowable, in a case where the assault was fatal, to add in the specification, "thereby causing his death," as indicating the measure of violence employed. XXIX, 485, *December, 1869*.

20. The "superior officer" in the sense of this Article, need not necessarily have been the *commanding* officer of the accused at the time of the offence. The article is thus broader than Art. 20, which relates only to an offence against a "commanding officer." XIX, 248, *December, 1865*.

21. A non-compliance by a soldier with an order emanating from a non-commissioned officer, or offering violence to the latter, is not an offence under this Article, but one to be charged, in general, under the 62d. XI, 491, *March, 1865*; IX, 90, *May, 1864*.

22. Under a charge of a disobedience of the order of a superior officer in violation of this Article, it should be alleged, and should appear from the evidence introduced, that the order or "command" was "lawful." XXVII, 488, *January, 1869*. An officer or soldier is not punishable under this Article for disobeying an *unlawful* order. XXVI, 603, *June, 1868*. But the order of a proper superior is to be presumed to be lawful, and should be obeyed, where it is not clearly and obviously in contravention of law. Unless the illegality is unquestionable, he should obey first, and seek redress, if entitled to any, afterwards. A military inferior in refusing or failing to comply with the order of a superior on the ground that the same is, in his opinion, unlawful, does so, of course, on his own personal responsibility and at his own risk.<sup>1</sup> XXVI, 256, *December, 1867*.

23. To justify, from a military point of view, a military inferior in disobeying the order of a superior the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and, if done, would not be susceptible of being righted. An order requiring the performance of a *military* duty or act cannot be disobeyed with impunity unless it has one of these characters. If not triable under the 21st Article such disobedience may be tried under the 62d. In the Cedarquist case (Card 97, *July, 1894*), the Acting Judge-Advocate General said:

"There could be no more dangerous principle in the government of the Army than that each soldier should determine for himself whether an order requiring a military duty to be performed is neces-

<sup>1</sup> See § 1853, *post*

sary or in accordance with orders, regulations, decision circulars, or custom, and may disobey the order if, in his judgment (taking, of course, all risks in case his judgment should be erroneous), it should not be necessary, or should be at variance with orders, regulations, decision circulars, or custom. It is his duty to obey such order first, and if he should be aggrieved thereby he can seek redress afterwards."<sup>1</sup>

24. *Held* that a member of a post band who refused (respectfully) to obey an order of the post commander directing the band to play in a town in the neighborhood of the post for the pleasure of the inhabitants, was not chargeable with a violation of this Article. XXVII, 520, *February, 1869*. So *held* that a soldier was not chargeable with "disobedience of orders" in not complying with an order forbidding him to contract marriage (XXXVIII, 47, *April, 1876*—see MARRIAGE); and similarly *held* of a refusal by a soldier to comply with an order (in violation of Sec. 1232, Rev. Sts.), to act as an officer's servant.<sup>2</sup> XLIV, 80, *July, 1880*.

25. The offence of disobedience of orders contemplated by this Article, consists in a willful refusal or neglect to comply with a specific order to do or not to do a particular thing. A mere failure to perform a routine duty is properly charged under Art. 62.<sup>3</sup> XXXIII, 280, *August, 1872*. Where an officer neglected fully to perform his duty under general instructions given him in regard to the conduct of an expedition against Indians; *held* that his offence was properly chargeable not under the 21st but under the 62d Article. XXXVIII, 454, *February, 1877*.

26. An illiterate soldier, unable to sign his name, was furnished with a written exhibit of it, and ordered by his commanding officer to continue to copy the same till he could properly sign his name to papers. He refused. *Held* that such order was not one palpably illegal, and that the soldier should have obeyed it and complained afterwards. 27, 76, *September, 1888*. When a soldier receives an order of doubtful legality only, it is his duty to obey it and seek redress afterwards. If he elects in such a case to disobey it in the first instance, his action is prejudicial to the good order and discipline of the service, and

<sup>1</sup>The civil responsibility is another matter. Civil courts have sometimes made allowance for the requirements of military discipline, but, if they should not, the military obligation would remain unimpaired. The soldier, in entering the service, has voluntarily submitted himself to this double and possibly conflicting liability. The evil of an undisciplined soldiery would be far greater than the injustice apparent, rather than actual, of this principle.

<sup>2</sup>So where a soldier was convicted of a disobedience of orders in refusing to assist in building a private stable for an officer, the finding was disapproved on the ground that such an order was not a lawful one. G. C. M. O. 130, Dept. of Dakota, 1879.

<sup>3</sup>See G. C. M. O. 26, War Dept., 1872, do 7, Dept. of Texas, 1879; G. O. 24, 35, Fifth Mil. Dist., 1898.

therefore a military offence under the 62d Article of War. 27. 484, *November, 1888.*

27. Par. 256, A. R. (263 of 1895), is regarded as authorizing stoppages in favor only of a tailor who is a soldier. But where, in the absence of a soldier competent for the purpose, a civilian tailor is by due authority employed, and an enlisted man of the command incurs, for work on clothing done by such tailor, certain charges according to the rates fixed by the council of administration, he may legally be ordered to settle the same, and, on refusal, may be made amenable for disobedience of orders under this Article.<sup>1</sup> 33, 22, *June, 1889.*

28. A soldier detailed to cook for a teamsters' mess, refused for the reason that the teamsters were civilians. Soldiers had previously been detailed for this purpose at this post, no provision for a special cook for the teamsters having been practicable. *Held* that the refusal was chargeable as a disobedience of orders under this Article, the teamsters being regular employees of the military establishment and a constituent of the garrison command. 28, 342, *December, 1888.*

29. Where an officer respectfully declined to comply with the direction of his superior to sign the certificate to a report of target-firing, on the ground that the facts set forth in such certificate were not within his knowledge, he having been stationed at the butt where he was not in a position to be informed as to such facts—*held* that he was not amenable to a charge of disobedience of orders under this Article. XLIX, 224, *July, 1885.*

30. *Held* that the disobedience, by a cadet private of the Military Academy, of an order of a cadet lieutenant of his company, the latter not being a commissioned officer, was not chargeable under this Article but was an offence under Art. 62. LVI, 289, *July, 1888.*

#### TWENTY-SECOND ARTICLE.

Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct.

31. Mutiny at military law may be defined to be an unlawful opposing or resisting of lawful military authority, with intent to subvert the same, or to nullify or neutralize it for the time.<sup>2</sup> It is this *intent* which distinguishes mutiny from other offences, and especially from those, with which, to the embarrassment of the student, it has fre-

<sup>1</sup> See §. 1220 R. S. and act of March 2, 1889 (25 Stat. 831). See also Circular 8, A. G. O., 1896, which by construction extends the regulation to include civilian tailors. See A. R. 293 of 1901.

<sup>2</sup> Compare the definition and description of mutiny or revolt at maritime law, in the *United States v. Smith*, 1 Mason, 147; *United States v. Haines*, 5 *et al.*, 272, 276; *United States v. Kelly*, 4 Wash., 528; *United States v. Thompson*, 1 Sumner, 168, 171; *United States v. Borden*, 1 Sprague, 374, 378.

quently been confused, viz: those punishable by the 21st Article, as also those which, under the name of "mutinous conduct," are merely forms of violation of Art. 62. The offences made punishable by this Article are not necessarily "aggregate" or joint offences.<sup>1</sup> 26, 284, *September, 1887*. Among them is the *beginning or causing of a mutiny*—which may be committed by a single person. In general, however, the offence here charged will be a concerted proceeding; the concert itself going far to establish the intent necessary to the legal crime. To charge as a capital offence under this Article a mere act of insubordination or disorderly conduct on the part of an individual soldier or officer, unaccompanied by the intent above indicated, is irregular and improper.<sup>2</sup> Such an act should in general be charged under Art. 20, 21, or 62. XXIX, 571, *January, 1870*. XXXVIII, 199, *July, 1876*.

32. Soldiers cannot properly be charged with the offence of joining in a mutiny under this Article, where their act consists in refusing, in combination, to comply with an *unlawful* order. Thus where a detachment of volunteer soldiers, who, under and by virtue of acts of Congress specially authorizing the enlistment of volunteers for the purpose of the suppression of the rebellion, and with the full understanding on their part, and that of the officers by whom they were mustered into the service, that they were to be employed solely for this purpose, entered into enlistments expressed in terms to be *for the war*, and after doing faithful service during the war, and just before the legal end of the war, but when it was practically terminated, and when the volunteer organizations were being mustered out as no longer required for the prosecution of the war, were ordered to march to the plains, and to a region far distant from the theatre of the late war, and engage in fighting Indians, wholly unconnected as allies or otherwise with the recent enemy; and thereupon refused, together, to comply with such orders, —*held* that they were not chargeable with mutiny. While by the strict letter of their contracts they were subject to be employed upon any military service up to the last day of their terms of enlistment, the public acts and history of the time made it perfectly clear that this enlistment was entered into for the particular purpose and in contemplation of the particular service above indicated, and to treat the parties as bound to another and distinct service, and liable to capital punishment if they refuse to perform it, was technical, unjust, and in substance illegal. XLII, 524, *March, 1880*.

<sup>1</sup> Samuel, 254, 257, G. O. 77, War Dept., 1837, do. 10, Dept. of the Missouri, 1863.

<sup>2</sup> See G. O. 7, War Dept., 1848, do. 115, Dept. of Washington, 1865; G. C. M. O. 73, Dept. of the Missouri, 1873. And compare *United States v. Smith*, 1 Mason, 147; *United States v. Kelly*, 4 Wash., 528; *United States v. Thompson*, 1 Sumner, 168, 171;

33. In a case where a brief mutiny among certain soldiers of a colored regiment was clearly provoked by inexcusable violence on the part of their officer; the outbreak not having been premeditated, and the men having been, prior thereto, subordinate and well conducted; *advised* that a sentence of death imposed by a court martial upon one of the alleged mutineers should be mitigated, and the officer himself brought to trial. XXVI, 64, *October, 1867*. Similarly *advised* in the cases of sentences of long terms of imprisonment imposed upon sundry colored soldiers, who (without previous purpose of revolt) had been provoked into momentary mutinous conduct by the recklessness of their officer in firing upon them, and wounding several, in order to suppress certain insubordination which might apparently have been quelled by ordinary methods.<sup>1</sup> XXV, 51, 75, 160, *August-November, 1867*.

#### TWENTY-THIRD ARTICLE.

Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.

#### TWENTY-FOURTH ARTICLE.<sup>2</sup>

All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct.

#### TWENTY-FIFTH ARTICLE.

No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended, in the presence of his commanding officer.

34. This article confers no jurisdiction or power to punish on courts

<sup>1</sup>Compare cases in G. O. 12, War Dept., 1855; do. 104, *id.*, 1863; G. C. M. O. 50, Hdqrs. of Army, 1867.

<sup>2</sup>It is a principle of the common law that any bystander may and should arrest an affrayer. 1 Hawkins, P. C., c. 63, s. 11; *Timothy v. Simpson*, 1 C. M. & R. 762, 765; *Phillips v. Trull*, 11 Johns, 486, 487. And that an officer or soldier, by entering the military service, does not cease to be a citizen, and as a citizen is authorized and bound to put a stop to a breach of the peace committed in his presence, has been specifically held by the authorities. *Burdett v. Abbott*, 4 Taunt., 449; *Bowyer*, Com. on Const. L. of Eng., 449; *Simmons* §§ 1096-1100. This article is thus an application of an established common law doctrine to the relations of the military service. See its application illustrated in the following General Orders: G. O. 4, War Dept., 1843; do. 63, Dept. of the Tennessee, 1863; do. 104, Dept. of the Missouri, 1863; do. 52, Dept. of the South, 1871; do. 92, *id.*, 1872.



martial, but merely authorizes the taking of certain measures of *prevention and restraint* by commanding officers: *i. e.*, measures preventive of serious disorders such as are indicated in the two following articles relating to duels.<sup>1</sup> XXVIII, 650, *June, 1869.*

#### TWENTY-SIXTH ARTICLE.

No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such corporal punishment as a court-martial may direct.

35. To establish that a challenge was sent, there must appear to have been communicated by one party to the other a deliberate invitation in terms or in substance to engage in a personal combat with deadly weapons, with a view of obtaining satisfaction for wounded honor.<sup>2</sup> The expression merely of a willingness to fight, or the use simply of language of hostility or defiance, will not amount to a challenge. XXXIX, 247, *October, 1877.* On the other hand, though the language employed be couched in ambiguous terms, with a view to the evasion of the legal consequences, yet if the intention to invite to a duel is reasonably to be implied,—and, ordinarily, notwithstanding the stilted and obscure verbiage employed, this intent is quite transparent,—a challenge will be deemed to have been given. And the intention of the message, where doubtful upon its face, may be illustrated in evidence by proof of the circumstances under which it was sent, and especially of the previous relations of the parties, the contents of other communications between them on the same subject, &c.<sup>3</sup> And technical words in an alleged challenge may be explained by a reference to the so-called dueling code.<sup>4</sup>

#### TWENTY-SEVENTH ARTICLE.

Any officer or noncommissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel shall be punished as a

<sup>1</sup> Compare Samuel, 372.

<sup>2</sup> Compare the definition in 2 Wharton, Cr. L. §§ 2674-2679.

<sup>3</sup> On the general subject of challenges, and the question what constitutes a challenge, see the principal cases of the sending of challenges in our service, as published in G. O. 64, A. G. O., 1827; do. 39, 41, *id.*, 1835; do. 2, War Dept., 1858; do. 359, *id.*, 1863; do. 11, Army of the Potomac, 1861; do. 46, Dept. of the Gulf, 1863; do. 223, Dept. of the Missouri, 1864; do. 130, *id.*, 1872; do. 33, Dept. & Army of the Tennessee, 1864. And compare Commonwealth v. Levy, 2 Wheeler, Cr. C. 245; Do. v. Tobbs, 1 Dana, 524; Do. v. Hart, 6 J. J. Marsh. 119; State v. Taylor, 1 S. C., 108; Do. v. Strickland, 2 Nott & McLeod, 181; Ivey v. State, 12 Ala., 277; Angler v. People, 34 Ill., 186; 2 Bishop, Cr. L., § 314; Samuel, 384-387.

<sup>4</sup> State v. Gibbons, 1 South., 51. It may be noted that our Articles of War, unlike the British, fail to make punishable, as a specific military offence, *the engaging in a duel.* Such an act, therefore, would, as such, be in general chargeable only under Art. 62.

challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post, or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial.

#### TWENTY-EIGHTH ARTICLE.

Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law, and have done their duty as good soldiers who subject themselves to discipline.

#### TWENTY-NINTH ARTICLE.

Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

**36.** This Article is expressly confined to cases of alleged wrongs on the part of regimental commanders. It cannot be extended to apply to a complaint of wrong done by a post commander who is not also the commanding officer of the regiment of the complainant. LV, 365, *March, 1888.*

#### THIRTIETH ARTICLE.

Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.

**37.** This Article is not inconsistent with Art. 83, which prohibits regimental courts from trying commissioned officers. It does not contemplate or provide for a *trial* of an officer as an *accused*, but simply an investigation and adjustment of some matter in dispute—as, for example, a question of accountability for public property, of right to pay or to an allowance, of relief from a stoppage, &c. The regimental court does not really act as a court but as a board, and the “appeal” authorized is practically from one board to another.<sup>1</sup> But though the regimental court has no power to find “guilty” or “not guilty,” or to

<sup>1</sup> See Macomb, §§ 193, 194; G. O. 13, War Dept., 1843; 1 Opins. At. Gen., 167; McNaughton's Annotations of the Mutiny Act, p. 86; O'Brien, pp. 123-129.



sentence, it should come to some definite opinion or conclusion—one sufficiently specific to allow of its being intelligently reviewed by the general court if desired. XXIII, 631, *July, 1867*; XXVIII, 113, *August, 1868*; XXIX, 227, *August, 1869*; XXX, 81, *February, 1870*; XXXII, 588, *May, 1872*.

38. The proceeding under this Article, not being a *trial*, is not affected by the limitation of the 103d Article. Due diligence, however, should be exercised in presenting the complaint, and a delay in a certain case to do so for three years (not satisfactorily explained), *held* unreasonable and properly treated by the court as seriously prejudicing the complaint. XXXI, 452, *June, 1871*.

39. The authority to summon a regimental court under this Article is vested in terms in the regimental commander. A department or other superior commander cannot properly exercise such authority, nor will his order add to the validity or effect of the proceeding. XXIX, 227, *August, 1869*.

40. The court cannot take cognizance of a complaint against an officer no longer in the service. So, where a company commander, having entered on the pay-rolls an unauthorized stoppage against a soldier, had resigned, and the same stoppage was thereupon continued by his successor: *held* that the complaint should be presented against the latter. XXXV, 332, *April, 1874*.

41. Where the alleged wrong was charged upon certain *officers' servants*, and it did not appear that their acts were authorized or sanctioned by the officers who employed them, *held* that the complaint was not one which could be taken cognizance of under this Article. XXIII, 631, *July, 1867*.

42. There are two manifest and unqualified limitations to the province of the regimental court under this Article, *viz.*—1. It can not usurp the place of a court of inquiry; 2. It can take no cognizance of matters which it would be beyond the power of the regimental commander to redress. When the matter is beyond the reach of this commander, it is beyond the jurisdiction of this court. If it involve a question of irregular details, excessive work or duty, wrongful stoppages of pay, or the like, a regimental court under this Article may be resorted to for the correction of the wrong. Otherwise when the case is one of a wrong such as can be righted only by the *punishment* of the officer.<sup>1</sup>

<sup>1</sup> The "regimental court-martial," under the 30th Article of War, can not be used as a substitute for a general court martial or court of inquiry, for it can not try an officer nor make an investigation for the purpose of determining whether he shall be brought to trial. When, if the soldier's complaint should be sustained, the only redress would be a reprimand to the officer, the matter would not be within the jurisdiction of this court. It can only investigate such matters as are susceptible of redress by the doing of justice to the complainant, that is, when in some way he can be set right

43, 37, 479, *September and November, 1890*; 47, 214, *May, 1891*; Card 855, *January, 1895*.

### THIRTY-FIRST ARTICLE.

Any officer or soldier who lies out of his quarters, garrison, or camp, without leave from his superior officer, shall be punished as a court-martial may direct.

### THIRTY-SECOND ARTICLE.

Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.

### THIRTY-THIRD ARTICLE.

Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place of parade, exercise, or other rendezvous appointed by his commanding officer, or goes from the same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct.

### THIRTY-FOURTH ARTICLE.

Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court-martial may direct.

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by putting a stop to the wrongful condition which the officer has caused to exist. Erroneous stoppages of pay, irregularity of detail, the apparent requirement of more labor than from other soldiers, and the like, might in this way be investigated and the wrongful condition put an end to. The court will in such cases record the evidence and its conclusions of fact, and recommend the action to be taken. The members of the court (and the judge-advocate) will be sworn faithfully to perform their duties as members (and judge-advocate) of the court, and the proceedings will be recorded, as nearly as practicable, in the same manner as the proceedings of ordinary courts-martial. *Manual for Courts-Martial (1901)*, p. 98, note.

An early instance of an appeal under this article is published in Orders No. 5, A. G. O., January 20, 1827, as follows:

"I: Under the 35th [now 30th] Article of War, the Commanding Officer at Fortress Monroe, on the 17th of November, 1826, assembled a regimental court-martial to examine into a complaint made by Musician R—— B—— against Lieutenant M—— of the 2d Artillery, and to do justice to the complainant." The court pronounced the following opinion:

"The court having heard and deliberately weighed the evidence in the case before them, and also Lieutenant M——'s statement, are of the opinion that the accusation is *not fully sustained*. \* \* \* In expressing this opinion the court do not find the occasion warranted the language made use of by Lieutenant M—— to the accuser, and the band in general."

Considering himself aggrieved by this "opinion," Lieutenant M—— "appealed to a general court-martial."

The court of which Lieutenant Colonel E—— was president, having been instructed to take cognizance of the case, made the following "decision:"

"The court having reexamined all the witnesses who appeared before the regimental court-martial; and having examined such other additional witnesses as were produced by the parties, \* \* \* confirm the opinion expressed by the regimental court-martial with the exception of the closing words, to wit, 'and the band in general.'"

This decision was "confirmed" by the Major General Commanding the Army.

## THIRTY-FIFTH ARTICLE.

Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offense.

## THIRTY-SIXTH ARTICLE.

No soldier belonging to any regiment, troop, battery, or company shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.

## THIRTY-SEVENTH ARTICLE.

Every noncommissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.

THIRTY-EIGHTH ARTICLE.<sup>1</sup>

Any officer who is found drunk on his guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such corporal punishment as a court-martial may direct.

43. *Held* that a soldier found drunk when on duty was properly convicted under this Article, though his drunkenness actually commenced before he went on the duty; his condition not being perceived till some time after he had entered upon the same. While it is in itself an offence knowingly to allow a soldier to go on duty when under the influence of intoxicating liquor, yet if a soldier is placed on duty while partially under this influence but without the fact being detected, and his drunkenness continues and is discovered while he remains upon the duty, he is strictly amenable under this Article, which prescribes not that the party shall *become* drunk, but that he shall be "*found drunk*" on duty.<sup>2</sup> XXXI, 324, *April, 1871.*

44. A charge of drunkenness on duty, (drill,) *held* not sustained where the party was found drunk, not at or during the drill, but at the hour appointed for the drill, which, however, by reason of his drunkenness, he did not enter upon or attend. The charge should properly have been laid under Art. 62. XXXIX, 226, *October, 1877.*

45. An officer reporting in person drunk, upon his arrival at a post, to the commander of which he had been ordered to report, *held* chargeable under this Article. And so *held* of an officer reporting, when drunk, to the post commander for orders, as officer of the day, after having been duly detailed as such. XXXVII, 152, *November, 1875.*

46. But where an officer, after being specially ordered to remain

<sup>1</sup>Note the emphatic order of the President in regard to violations of this Article, published in G. O. 104, *Hqrs. of Army, 1877.*

<sup>2</sup>See cases in G. O. 11, Dept. of Louisiana, 1860; G. C. M. O., 113, Dept. of the Missouri, 1873.

with his company, absented himself from it and from his duty, and, while thus absent, became and was found drunk, *held* that he was not strictly chargeable with drunkenness on duty under this Article, but was properly chargeable with drunkenness in violation of the 62d Article, disobedience of orders, and unauthorized absence. XXXVIII, 425, *January, 1877*.

47. A post commander, while present and exercising command as such, is deemed to be at all times on duty in the sense of this Article, and thus liable to a charge under the same if found drunk at the post.<sup>1</sup> XXVI, 486, *March, 1868*; XXXVIII, 306, *September, 1876*.

48. A medical officer of a post, where there are constantly sick persons under his charge who may at any moment require his attendance, may, generally speaking, be deemed to be "on duty" in the sense of the Article, during the whole day, and not merely during the hours regularly occupied by sick call, visiting the sick, or attending hospital. If found drunk at any other hour he may in general be charged with an offence under this Article. XXXVII, 116, *November, 1875*.

49. The drunkenness need not be such as totally to incapacitate the party for the duty; it is sufficient if it be such as sensibly to impair the full and free use of his mental or physical abilities. XXXVI, 444, *April, 1875*; XXXVII, 118, 152, 673, *November, 1875*, to *June, 1876*; XXXVIII, 272, *August, 1876*; XLI, 339, *July, 1878*. It is not a sufficient defence to a charge of drunkenness on duty to show that the accused, though under the influence of liquor, contrived to get through and somehow perform the duty. XXXVII, 118, *November, 1875*.

50. Where a court in its findings substituted the words "under the influence of intoxicating liquor" for the word "drunk" in a specification under this Article, and found "not guilty" of the charge but "guilty" of conduct to the prejudice, etc., *remarked*, that such a discrimination as this finding apparently attempts can not safely be encouraged in the disposition of cases arising under this Article. The object of the Article is manifestly to enforce that measure of sobriety which is essential to the full and calm control of both the mental and physical faculties, and thus to protect the military administration from the great mischief to which it may be liable from the blunders and excesses of officers attempting to perform their duties under the influence of drink. Any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the Article; and should the con-

<sup>1</sup>That the Article is not limited in its application to mere duties of detail, but embraces all descriptions and occasions of duty,—see the interpretation of the same as declared in G. O. 7, War Dept., 1856, and affirmed in G. O. 5, *id.*, 1857. The case in the latter order, indeed, was a case of drunkenness while on duty as a post commander. See another case of the same character in G. C. M. O. 21, Dept. of the Missouri, 1870, and the remarks of Maj. Gen. Schofield thereon, and compare G. C. M. O. 9, War Dept., 1875.

dition of an officer accused of that offence not have partaken of this description, it is better that he be acquitted than that courts by endeavoring to mark degrees of drunkenness should attempt distinctions, which in practice would tend to defeat, in great measure, the purpose of the Article. *Recommended*, therefore, that the findings in this instance be disapproved.<sup>1</sup> XXXVI, 44, *April, 1875*.

51. It is immaterial whether the drunkenness be voluntarily induced by spirituous liquor or by opium or other intoxicating drug: in either case the offence may be equally complete.<sup>2</sup> XXXVIII, 409, *January, 1877*.

52. Drunkenness not on duty, or when off duty, when amounting to a "disorder," should be charged under Article 62, unless, (in a case of an officer,) committed under such circumstances as to constitute an offence under Art. 61. XXXI, 52, *November, 1870*.

53. No punishment except dismissal can legally be imposed upon an officer on a conviction of the offence made punishable by this Article. A sentence imposing, with dismissal, any further punishment, as imprisonment or forfeiture of pay, is, as to such additional penalty, unauthorized and inoperative, and should, so far, be disapproved. XIV, 330, *March, 1865*.

54. Drunkenness on duty on occasions other than those specified in the order prescribing maximum punishments are offences under the 38th Article, for which maximum punishments have not been prescribed. They remain, therefore, punishable at the discretion of the court martial as authorized by the Articles of War and the custom of the service. 64, 445, *April, 1894*.

### THIRTY-NINTH ARTICLE.

Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.

<sup>1</sup>This opinion and recommendation were concurred in, see the order publishing the case, G. C. M. O. 33, War Department, 1875.

This Article has been repeatedly construed in General Orders. In G. O. No. 53, Hdqrs. Army of the Potomac, of 1862 the General Comdg., in stating that he finds it hard to understand the doubts sometimes entertained "as to the degree of intoxication which unfits a soldier for the performance of his duties," observes:

"Unfitness may be more or less complete, but to be intoxicated at all unfits a man either to give an order or to execute it."

In a subsequent General Order of the same Army, No. 98, of 1862, it is said:

"Nothing can be more erroneous than to suppose that as long as an officer is not drunk to insensibility—a condition, moreover, in which he is far less apt to do mischief than when he is simply drunk enough to be in his post—he need drink at all."  
"The fullest possession of his faculties by every officer is necessary to fit him to discharge his duties properly. These duties are not so simple as to be within the competency of a half-sober person."

See also G. C. M. O. 21, Dept. of the Mo., 1870, do. 48, Dept. of Va. & N. C., 1894; do. 33, Dept. of the Platte, 1871.

<sup>2</sup>Simmons, § 157. And see Hough—Precedents, 208, James' Precedents, 60.

55. It is no *defence* to a charge of "sleeping on post" that the accused had been previously overtasked by excessive guard duty;<sup>1</sup> or that an imperfect discipline prevailed in the command and similar offences had been allowed to pass without notice;<sup>2</sup> or that the accused was irregularly or informally posted as a sentinel.<sup>3</sup> Evidence of such circumstances, however, may in general be received in extenuation of the offence; or, after sentence, may form the basis for a mitigation or partial remission of the punishment.<sup>4</sup> An officer who places or continues a soldier on duty as a sentinel when from excessive fatigue, infirmity, or other disability, he is incompetent to perform the important duties of such a position, will ordinarily render himself liable to charges.<sup>5</sup>

#### FORTIETH ARTICLE.

Any officer or soldier who quits his guard, platoon, or division, without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct.

#### FORTY-FIRST ARTICLE.

Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as a court-martial may direct.

#### FORTY-SECOND ARTICLE.

Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.

56. Misbehavior before the enemy may be exhibited in the form of cowardice, or it may consist of a wilful violation of orders, gross negligence or inefficiency, an act of treason or treachery, &c.<sup>6</sup> It need not be committed in the actual sight of the enemy, but the enemy must be in the neighborhood, and the act of offence have relation to some movement or service directed against the enemy, or growing out of a movement or operation on his part. It may be committed in an Indian

<sup>1</sup> See G. O. 74, Army of the Potomac, 1862; also G. O. cited in note 3, *infra*.

<sup>2</sup> G. O. 74, Army of the Potomac, 1862.

<sup>3</sup> G. O. 10, Middle Mil. Dept., 1865; do. 166, Dept. of the South, 1864.

<sup>4</sup> See G. O. 10, 62, Dept. of Va. & N. C., 1863; do. 2, Northern Dept., 1865; do. 67, Dept. of Washington, 1866; do. 9, Dept. of the South, 1870; G. C. M. O. 44, Dept. of Texas, 1875.

<sup>5</sup> See G. O. 15, Army of the Potomac, 1861; do. 62, Dept. of Va. & N. C., 1863; G. C. M. O. 59, Dept. of Texas, 1872; do. 80, Dept. of the Missouri, 1875.

<sup>6</sup> The phases which this offence may assume are well illustrated in cases published in the following General Orders: G. O. 5, War Dept., 1857; do. 183 *id.*, 1862; do. 18, 134, 146, 189, 204, 229, 282, 317, *id.*, 1863; do. 27, 64, *id.*, 1864; G. C. M. O. 90, 114, 272, 279, *id.*, 1864; do. 53, 91, 107, 124, 126, 134, 191, 421, *id.*, 1865.



war equally as in a foreign or civil war.<sup>1</sup> VI, 79, *April, 1864*; XI, 274, *December, 1864*; XLII, 546, *March, 1880*.

57. The term "his arms or ammunition" does not refer to arms, &c., which are the personal property of the soldier, but means such as have been furnished to him by the proper officer for use in the service.<sup>2</sup> The term is to be construed in connection with the further similar expression, "his post or colors." VI, 79, *April, 1864*.

#### FORTY-THIRD ARTICLE.

If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.

#### FORTY-FOURTH ARTICLE.

Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death, or such other punishment as a court-martial may direct.

#### FORTY-FIFTH ARTICLE.

Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.

58. In view of the general term of description in this and the succeeding Article—"Whosoever," it was *held*, during the war of the rebellion, by the Judge-Advocate General and by the Secretary of War,<sup>3</sup> and has been held later by the Attorney General,<sup>4</sup> that *civilians*, equally with military persons, were amenable to trial and punishment by court-martial under either Article.<sup>5</sup> II, 498, *June, 1863*; V, 291, *November, 1863*; XI, 215, 454, *December, 1864*, and *February, 1865*.

<sup>1</sup> See case in G. O. 5, War Dept., 1857, in which a soldier was sentenced to be hung upon conviction of misbehavior before the enemy on the occasion of a fight with Indians.

<sup>2</sup> See Samuel, 592; Hough (Practice), 336.

<sup>3</sup> See G. O. 67, War Dept., 1861; also the following Orders of that Department publishing and approving sentences of civilians tried and convicted under these Articles. — G. O. 76, 175, 250, 371, of 1863, do. 51 of 1864, G. C. M. O. 106, 157, of 1864, do. 200, 671, of 1865.

<sup>4</sup> 13 Opms. At. Gen., 470, 472.

<sup>5</sup> Admitting this construction to be warranted so far as relates to acts committed on the theatre of war or within a district under martial law, it is to be noted that it is the effect of the leading adjudged cases to preclude the exercise of the military jurisdiction over this class of offences, when committed by civilians in places not under military government or martial law. See, especially, *Ex parte Milligan*, 4 Wallace, 2 121-123; *Jones v. Seward*, 40 Barb., 563; also other cases cited in note to § 1031, *post*.

But the sounder construction is believed to be that, as the Articles of War are a code enacted for the government of the military establishment, they relate only to

59. During the war of the rebellion, all inhabitants of insurrectionary States were *prima facie* enemies in the sense of this and the succeeding Article.<sup>1</sup> XIV, 266, *March, 1865*. A citizen of an insurgent State who entered the U. S. military service became of course no longer an enemy. So held of a lieutenant of the 1st E. Tenn. Cavalry. XXIX, 206, *August, 1869*.

60. It is no less a *relieving* an enemy under this Article that the money, &c., furnished is *exchanged* for some commodity, as cotton, valuable to the other party. XII, 385, *March, 1865*; XIV, 266, *March, 1865*; XVI, 446, *August, 1865*.

61. The act of "relieving the enemy" contemplated by this Article is distinguished from that of trading with the enemy in violation of the laws of war; the former being restricted to certain particular forms of relief, while the latter includes every kind of commercial intercourse not expressly authorized by the Government. XIV, 266, *March, 1865*. See LAW OF WAR.

#### FORTY-SIXTH ARTICLE.

Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.

62. Held that the offence of *holding correspondence* with the enemy was completed by writing and putting in progress a letter to an inhabitant of an insurrectionary State during the war of the rebellion; it not being deemed essential to this offence that the letter should reach its destination.<sup>2</sup> IV, 370; V, 274, 291; *November, 1863*; X, 567, *November, 1864*.

persons belonging to that establishment, unless a different intent should be expressed or otherwise made manifest. No such intent is so expressed or made manifest. Persons not belonging to the military establishment may be proceeded against for the acts mentioned in the Article, but it is by virtue of the power of another jurisdiction, namely, martial law; and martial law does not owe its existence to legislation but to necessity. The scope of these Articles under the legislation of 1776, apparently extending their application to civilians, seems to have become modified on the adoption of the Constitution.

Possibly the 63d Article of War should be construed as making "retainers to the camp," &c., part of the military forces for the time being. But see the case of B. G. Harris, M. C., tried by court martial in 1865. (H. R. Ex. Doc. 14, 39th C., 1st S.)

<sup>1</sup>See the opinion of the U. S. Supreme Court (frequently since reiterated, in substance), as given by Grier, J., in the "Prize Cases," 2 Black, 635, 666 (1862); and by Chase, C. J., in the cases of Mrs. Alexander's Cotton, and The Venice, 2 Wallace, 258, 274, 418 (1864). In the latter case the Chief Justice observes: "The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the government and of all the citizens or subjects of the other, applies equally to civil and to international wars." That an insurrectionary State was no less "enemy's country," though in the military occupation of the United States, with a military governor appointed by the President—see opinion by Field J. in *Coleman v. Tennessee*, 7 Otto, 500, 516-517.

<sup>2</sup>O'Brien, 147; Hensley's Case, 1 Burrow, 642; Stone's Case, 6 Term, 527; Samuel, 580.



63. It is essential, however, to the offence of *giving intelligence* to the enemy that material information should actually be communicated to him; the communication may be verbal, in writing, or by signals. XIV. 273, *March, 1865*.

#### FORTY-SEVENTH ARTICLE.

Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

SEE DESERTION.

#### FORTY-EIGHTH ARTICLE.

Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.

64. The liability to make good to the United States the time lost by desertion, enjoined by the first clause of this Article, is independent of any *punishment* which may be imposed by a court-martial, on conviction of the offence: it need not, therefore, be adjudged or mentioned in terms in a *sentence*.<sup>1</sup> L. 413, *June, 1886*. If the sentence is *disapproved*, the legal status of the accused is the same as if he had been acquitted, and the obligation of additional service is not incurred. XXVI. 568, *June, 1868*. The effect of such disapproval is to remove from his record the charge of desertion, but if the fact of unauthorized absence from the service is duly shown by the muster rolls, he is, independently of the result of his trial, not entitled to *pay* during the period of such absence. 36, 303, *November, 1889*.

65. Where a deserter was sentenced to imprisonment for the "balance of his term" and had undergone such punishment, *held* that he was not absolved from the obligation to make good time lost; the words "balance of his term" referring to the balance of the term of his original enlistment. XI. 615, 680, *April, 1865*; XXVII. 439, *December, 1868*.

66. The time passed by a deserter in confinement under sentence cannot be computed as a part of the period required by the Article to be made good to the United States, such time not being a time of military service, but of punishment. XXX. 506, *July, 1870*; XXXI. 275, 374, *March and May, 1871*. Nor can the period of confinement

<sup>1</sup> See G. O. 21, Dept. of the Lakes, 1873; do. 94, Dept. of the Missouri, 1867; G. C. M. O. 74, Dept. of the East, 1873. The old ruling *contra* see G. O. 26, 45, Hdqrs. of Army, 1843 may be regarded as abandoned in our law and practice.

be credited where the sentence is remitted before it is fully executed. XXIV, 39, *November, 1866*. So, time passed by the deserter in arrest or confinement (or in hospital) while awaiting trial or action upon his sentence, cannot be so computed. XII, 326, *February, 1865*.

67. The enforcement of the liability, where enforced at all, is generally postponed till after the execution of the punishment (if any) imposed upon the deserter by his sentence. A deserter may still be required to make good the time included in his unauthorized absence from the service, although his term of enlistment has expired pending a term of confinement adjudged him by court martial on conviction of his offence, provided he has not been discharged. XXXII, 40, *October, 1871*.

68. The United States may waive the liability imposed by the first clause of the Article. It is in fact waived where the deserter, without being required to perform the service, is *discharged* by one of the officials authorized by Art. 4 to discharge soldiers. So it is waived where the soldier is adjudged to be dishonorably discharged by sentence of court martial, and this punishment is duly approved and thereupon executed. XXIX, 507, *December, 1869*; XXX, 506, *July, 1870*; XXXVII, 416, *March, 1876*. Nor does a deserter who has been duly discharged from the service remain amenable to trial under the last clause of this article. XXXI, 48, *November, 1870*.

69. The liability to trial and punishment imposed by the second clause of the Article is subject to the limitation of prosecutions prescribed by Art. 103.<sup>1</sup> XXXI, 384, *May, 1871*.

70. The contract of enlistment is for military service for a term of years and when interrupted by the soldier's desertion remains incomplete and subject to specific performance. While some authorities hold that the obligation to make good time lost by desertion attaches only upon conviction,<sup>2</sup> the weight of authority and the practice are to the effect that the punishment for desertion and the obligation to complete the contract of enlistment are separate and distinct, and that the restoration of a deserter to duty without trial does not relieve him from the obligation to complete his contract. LIII, 276, *April, 1887*; 26, 487, *September, 1888*. This obligation continues though the statute of limitation has taken effect in his case, or has been successfully pleaded in bar on a trial by court-martial. XXXVII, 416, *March, 1876*; 40, 69, *March, 1890*.

71. The restoration of a deserter to duty without trial is practically a pardon before conviction; it is termed by some military writers "a constructive pardon,"<sup>3</sup> and is a valid plea in bar of trial for desertion.

<sup>1</sup>This opinion is clearly applicable to the 103d Article as amended by the act of April 11, 1890, its present form.

<sup>2</sup>15 Opins. At. Gen., 152; 16 *id.* 170.

<sup>3</sup>1 Winthrop, 380.

As all pardons proceed upon the hypothesis of the legal guilt of the person pardoned, the restoration of a deserter to duty without trial presupposes the commission of desertion. A pardon, like a deed, must, in order to take effect, be delivered to, and accepted by the party to whom it is granted. In military cases the acceptance is commonly indicated by the soldier voluntarily submitting to the proceeding or performing the act required as a condition. This acceptance of, or submission to, the restoration to duty without trial is virtually a confession of his guilt; his desertion thus becomes an established fact, as much as if he had been tried and convicted.<sup>1</sup> 21, 223, *December, 1887*.

72. Time lost by desertion must be made good by a deserter who accepts or submits to restoration to duty without trial, though the order directing such restoration fails to impose the same as a condition, the authority invested by the regulations with the right to restore deserters to duty without trial being without power to waive in such restorations the condition to make good the time lost. 26, 487, *September, 1888*.

#### FORTY-NINTH ARTICLE.

Any officer who, having tendered his resignation, quits his post or proper duties, without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.

#### FIFTIETH ARTICLE.

No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on a penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.

73. This Article, in its first clause, does not create a specific offence, or a particular kind of desertion, or an offence distinct from the desertion made punishable in the 47th Article, but declares in effect that a soldier who abandons his regiment, etc., shall be deemed none the less a deserter although he may forthwith re-enlist in a new regiment. It does not render the act of re-enlistment a desertion, but simply makes the re-enlistment, under the circumstances indicated, *prima facie* evidence of a desertion from the previous enlistment from which the soldier has not been discharged, or, more accurately, evidence of an intent not to return to the same.<sup>2</sup> The object of the provision, as it

<sup>1</sup> See Circ. 4, A. G. O., 1884, A. R. 132 of 1895, and A. R. 143 of 1901.

<sup>2</sup> See the similar view expressed in G. C. M. O. 129, Dept. of the Missouri, 1872; do. 77, *id.*, 1874.

originally appears in the British code, apparently was to preclude the notion, that might otherwise have been entertained, that a soldier would be excused from repudiating or departing from his original contract of enlistment, provided he presently renewed his obligation in a different portion of the military force.<sup>1</sup> XLII, 642, *May, 1880*; 7, 298, *September, 1885*; 10, 4, *May, 1886*; 49, 442, *October, 1891*; Cards 355, *September, 1894*; 902, *February, 1895*; 1571, *July, 1895*.

74. *Held* that an enlisted marine, who abandoned the marine corps without a discharge and enlisted in the Army, could not be "reputed a deserter" according to the terms of this Article; but *advised* that he be turned over to the commandant of that corps for the proper disposition and action.<sup>2</sup> XXXI, 170, 379, *February and May, 1871*.

75. Where a soldier enlisted in a certain regiment, after being officially notified that he was duly discharged from a previous enlistment, but without having received the written certificate and evidence of his discharge, which, by mistake or accident, had not been delivered to him as required by Art. 4,—*held* that he could not properly be "reputed" or charged as a deserter. XXXVIII, 343, *October, 1876*.

76. An enlistment in violation of this Article is not void but voidable at the option of the United States only. Until so avoided service under it is valid service. 43, 48, *September, 1890*; 53, 254, *April, 1892*; Cards 321, 355, 359, *September, 1894*; 494, *October, 1894*; 902, *February, 1895*; 1429, *June, 1895*; 1571, *July, 1895*; 1624, *August, 1895*; 2022, *January, 1896*; 2115, *March, 1896*; 2269, *May, 1896*; 2717, *November, 1896*. On a trial for an offence committed during such enlistment, a plea by the accused, in bar of trial, that this enlistment being fraudulent on his part, is void, should not be sustained. 39, 257, *March, 1890*.

#### FIFTY-FIRST ARTICLE.

Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and, in time of peace, any punishment, excepting death, which a court-martial may direct.

77. A declaration, made by one soldier to another, of a willingness to desert with him in case he should decide to desert, *held* not properly an *advising* to desert, in the sense of this Article. To constitute the offence of *advising to desert*, it is not essential that there should have been an actual desertion by the party advised. But otherwise as to the offence of *persuading to desert*: to complete this offence the persuasion should have induced the act.<sup>3</sup> XXXIX, 407, *January, 1878*.

<sup>1</sup> See Samuel, 330, 331.

<sup>2</sup> See now § 1422, *post*; also A. R. 134 of 1895 (145 of 1901).

<sup>3</sup> Compare Hough (Practice), 172, and cases in G. O. 23, Dept. of the Missouri, 1862; G. C. M. O. 11, 152, Id., 1868.

## FIFTY-SECOND ARTICLE.

It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall, for his first offense, forfeit one-sixth of a dollar; for each further offense he shall forfeit a like sum, and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied, by the captain or senior officer of his troop, battery, or company, to the use of the sick soldiers of the same.

## FIFTY-THIRD ARTICLE.

Any officer who uses any profane oath or execration shall, for each offense, forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offenses shall be applied as therein provided.

## FIFTY-FOURTH ARTICLE.

Every officer commanding in quarters, garrison, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command, and if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go towards such reparation, he shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

78. While this Article would certainly appear to contemplate the making of reparation for injuries done to the *persons* of citizens rather than for injuries done to their *property*, yet *advised*, in view of the precedents, that it might probably be regarded as within the equity of the Article to indemnify a citizen for wanton injury done to his *property* by a soldier or soldiers, by means of a stoppage against his or their pay, summarily ordered upon investigation by the commanding officer.<sup>1</sup> VII, 263, *February, 1864*. In a few cases a stoppage of the

<sup>1</sup> G. O. 35, H. Q. A., 1868, construing this article, and prescribing the procedure under it, reparation for injury to *property* as well as *persons* being authorized, reads as follows:

"Under the 32d (now 54th) of the Rules and Articles of War, it is made the duty of commanding officers to see reparation made to the party or parties injured, from the pay of soldiers who are guilty of abuses or disorders committed against citizens. Upon proper representation by any citizen, of wanton injury to his person or property, accompanied by satisfactory proof, the commanding officer of the troops will cause the damage to be assessed by a board of officers, the amount stopped against the pay of the offenders, and reparation made to the injured party. This proceeding will be independent of any trial or sentence by court martial for the criminal offense."

This Article is antiquated in form and indefinite and incomplete in its provisions, and calls for repeal or amendment. For some of the principal cases in which it has been applied in our practice, the student is referred to G. O. 4, Dept. of the Ohio, 1863, do. 123, Dept. of the Gulf, 1864, do. 161, Dept. of Washington, 1865, do. 59, *id.*, 1866; do. 74, Dept. of Arkansas, 1865; do. 48, 55, Dept. of Louisiana, 1866, do. 6, Dept. of the Cumberland, 1867; do. 10, Dept. of the South, 1870.

pay of an entire organization, for damage to private property committed by its members, has been sanctioned as authorized under the general remedial provisions of this Article. VIII, 671, *July, 1864*; XII, 673, *September, 1865*; Cards, 1861, *November, 1895*, and 6839, *August, 1899*.

79. The stoppage contemplated is quite distinct from a *punishment* by *fine*, and it cannot affect the question of the summary reparation authorized by the Article, that the offender or offenders may have already been tried for the offence and sentenced to forfeiture of pay. In such a case, indeed, the forfeiture, as to its execution, would properly take precedence of the stoppage. On the other hand, where the stoppage is first duly ordered under the Article, it has precedence over a forfeiture subsequently adjudged for the offence. XXI, 447, *June, 1866*.

80. It does not affect the question of reparation under the Article, that the offender or offenders may be criminally liable for the injury committed, or may have been punished therefor by the civil authorities. XXXIV, 335, *June, 1873*.

81. *Held* that the remedial provision of this Article could not be enforced in favor of military persons (XXVI, 352, *January, 1868*; XXVII, 453, *January, 1869*; XXXII, 152, *December, 1871*); or in favor of the United States (XXVI, 37, *September, 1867*); or to indemnify parties for property *stolen* or *embezzled*. XXXV, 139, *January, 1874*; Card 8043, *April, 1900*.

82. The pay of the offender or offenders can be resorted to only for the purpose of the "reparation." A military commander can have no authority to add a further amount of stoppage by way of *punishment*. VIII, 671, *July, 1864*.

83. *Held* that, as an agency for assessing the amount of the damage, a court martial could not properly be substituted for the board, directed by G. O. 35, Hdqrs. of Army, 1868, to be convened for such purpose. XXXVII, 52, *October, 1875*.

84. The procedure under this Article, and pursuant to G. O. 35 of 1868, is as follows: The citizen aggrieved tenders a "complaint" under oath, charging the injury against a particular soldier or soldiers, described by name (if known), regiment, &c., and accompanied by evidence of the injury, and of the instrumentality of the person or persons accused. If such evidence be satisfactory, the commanding officer has the damages assessed by a board, and makes order for such stoppage of pay as will be sufficient for the "reparation" enjoined by the Article. The commander must have a proper case presented to him; he cannot legally proceed *sua sponte*. XLV, 14, *August, 1881*.

85. Where proof was duly made under this Article of injury done



by some persons of a command, but the active perpetrators could not, upon investigation, be determined, and it appeared that the entire command was present and implicated, *held* that the stoppage might legally be made against all the individuals present. L. 9, *January, 1886*.

86. It would not be a sound construction of the Article to extend the specified measure of redress to other than the specified cases. Its strict construction would indeed limit the specific redress to acts of violence against the person, but the weight of American authority extends it to acts of violence against property also. Further than this, the authorities do not go, holding, for example, that it is not applicable to cases of larceny and embezzlement. Therefore *held* that to make a stoppage of pay against enlisted men to reimburse the keeper of a restaurant for food ordered by them and not paid for would be wholly unauthorized by the terms, scope, or intent of the Article. 37, 293, *December, 1889*.

#### FIFTY-FIFTH ARTICLE.

All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish ponds, houses, gardens, grain fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States (unless by order of a general officer commanding a separate army in the field), shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct.

#### FIFTY-SIXTH ARTICLE.

Any officer or soldier who does violence to any person bringing provisions or other necessities to the camp, garrison, or quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct.

#### FIFTY-SEVENTH ARTICLE.

Whoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forges a safeguard, shall suffer death.

#### FIFTY-EIGHTH ARTICLE.

In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or District in which such offence may have been committed.

ments the commanding officer can not properly surrender nor the civil authorities arrest, within a military command, an accused officer or soldier. Where it is doubtful whether the application is made in good faith and in the interests of law and justice, the commander may demand that the application be especially explicit and be sworn to; and in general the preferable and indeed only satisfactory course will be to require the production, if practicable, of a due and formal warrant or writ for the arrest of the party.<sup>1</sup> XXI, 567, *July, 1866*; XXIII, 490, *May, 1867*; XXXV, 357, *May, 1874*; LIII, 442, *May, 1887*. The application required by the Article should be made in a case where the crime was committed by the party *before* he entered the military service equally as where it was committed by him while in the service.<sup>2</sup> In the former case a more exact identification may perhaps reasonably be required. XII, 145, *December, 1864*.

96. The provisions of the Article are applicable only when the officer or soldier is accused of a crime or offence "which is punishable by the laws of the land," *i. e.*, by the laws of the particular State or Territory, or of the United States, or by the common law as recognized in the State or Territory. XXXV, 357, *May, 1874*. The by-laws or ordinances of a town or city are a part of the "laws of the land" within the meaning of this Article.<sup>3</sup> Card 638, *November, 1894*.

97. The Article is not applicable to the case of an officer or soldier charged with introducing liquor into the Indian country in violation of the United States statutes, the same not being an offence against

<sup>1</sup> 2 Opins. At. Gen., 10; 8 *id.*, 413, 421; *Ex parte McRoberts*, 16 Iowa, 800, 803-805.

<sup>2</sup> See G. O. 29, Dept. of the Northwest, 1864, where it is remarked that there is an *express* obligation to surrender the soldier, where the crime was committed by him before entering the military service.

<sup>3</sup> As to the meaning of the term "laws of the land," especially as contrasted with municipal ordinances, see *Vanzyant v. Waddell*, 2 Yerger, 270; *State Bk. v. Cooper*, *id.*, 605; *Horn v. People*, 26 Mich., 224. But the question as applicable to the 50th Article was specifically decided by Attorney-General Olney under date of November 26, 1894 (21 Opins., 88), as follows:

"1. Does the expression 'laws of the land' as used in the 50th Article of War include city ordinances and by-laws?

"2. May a soldier be arrested, tried, and punished by a civil authority for the violation of a city ordinance?

"3. If he escapes to a military reservation, can a demand be made by the civil on the military authorities for his surrender, and if so, will it be the duty of the commanding officer to surrender him?"

"If the first question is answered affirmatively, I see no escape from the conclusions, that a soldier may be arrested, tried, and punished by the proper civil authorities for the violation of a city ordinance, and that, if he escape to a military reservation, his surrender may be demanded by the proper civil authorities and should be made by the military officer in command.

"The real inquiry then being whether a municipal ordinance is comprehended by the phrase 'laws of the land' as used in the 50th Article of War, I have no hesitation in saying that in my judgment it is so comprehended.

"The general reasoning on the subject by the learned Acting Judge Advocate General, as contained in his elaborate memorandum of January 25, 1875 cannot, I think, be successfully controverted and need not be here repeated. But it may not



the person or property of a citizen. XXXII, 445, *March, 1872*. Where the jurisdiction of the United States over any military reservation or other place is unconditionally exclusive, no State official can legally serve a warrant upon an officer or soldier within the limits of such reservation or place.<sup>1</sup> XXI, 567, *July, 1866*.

96. The party should be surrendered upon proper application, though the offence be one of which a military court has jurisdiction concurrently with the civil courts; unless, indeed, the military jurisdiction has already duly attached (by means of arrest or service of charges with a view to trial), in which case the prisoner may be surrendered or not as the proper authority may determine. A soldier under a sentence of confinement imposed by court martial cannot, in general, properly be surrendered under this Article. In such a case, the civil authorities should, regularly, defer their application till the military punishment has been executed or remitted.<sup>2</sup> XXXI, 317; *April, 1871*; 54, 33, *June, 1892*. Where a soldier, duly surrendered under this Article and allowed to go on bail, was thereupon returned to duty, or having escaped from the civil and come again into the custody of the military authorities,<sup>3</sup> held that it was within the spirit of the Article for the department commander to instruct the commanding officer of such soldier to cause him to appear for trial at the proper time. XXI, 457, *June, 1866*.

be amis- to make special reference to a class of adjudications which clearly define the nature of municipal ordinances and apparently render the result reached by Colonel Lieber inevitable. They are illustrated by a recent case in Vermont in which the facts were that a village charter granted to the village certain powers in the matter of licensing eating-houses which were repugnant to a general statute already in force. The village made a by-law or ordinance pursuant to its charter and the question arose which prevailed—the ordinance or the general law? Did the general law nullify the ordinance or did the ordinance nullify the general law *pro tanto* and as regards that particular village? The decision was that the ordinance, conforming as it did to the charter, repealed for that village the pre-existing general law. It was held to do so because though in form an ordinance, yet being authorized by the village charter, it was in reality a special statute of the State of Vermont. The same principle is affirmed in numerous well-considered adjudications of the highest authority. But if valid municipal ordinances are in substance and effect special statutes of the State chartering the cities or towns making the ordinances, they are certainly to be regarded as among the 'laws of the land' unless that phrase is to be construed as covering the general legislation of the State only and is exclusive of its special legislation. But no distinction of that sort, it is believed, has ever been attempted or has any foundation in reason or precedent. The result is, as already stated, that the by-laws or ordinances of a town or city are to be taken as part of the 'laws of the land' within the meaning of that phrase as used in the 59th Article of War.' (Published in Circ. 15, A. G. O. 1894.)

<sup>1</sup>See *Civil Serv. &c.* It is further held, in *Ex parte McRoberts*, 16 Iowa, 600, 603, that the provisions of the Article apply only to officers and soldiers while within the immediate control and jurisdiction of the military authorities, and therefore do not apply to a case of a soldier *absent on furlough*, but that such a soldier, pending his furlough, may be arrested in the same manner as any civilian.

<sup>2</sup>Compare 6 Opins. At. Gen., 423.

<sup>3</sup>See a case published in G. O. 7, Dept. of the South, 1871.

99. A soldier on bail awaiting trial by civil court may, while in this status, be brought before a military court for trial. But the military proceedings should not interfere with the civil; therefore *remarked* that if in the particular case the court-martial would probably award a term of confinement extending beyond the time fixed for the trial by the civil court, the military trial shall be postponed. Card 1717, *September, 1895.*

100. An officer or soldier accused as indicated by the Article, though he may be willing and may desire to surrender himself to the civil authorities, or to appear before the civil court, should not in general be permitted to do so, but should be required to await the formal application. XXXI, 622. *September, 1871.*

101. The term "any of the United States," employed in this Article, *held* properly to include any and all the political members of our governmental system, and to embrace an organized Territory equally with a State. 83, 406. *February, 1894.*

102. The Article is directory not jurisdictional. It does not limit the action to be taken by the military authorities to cases where the application is made *by* the injured party or *in his behalf*. It does not place a soldier who has committed a crime and been indicted therefor beyond the reach of the civil power if the person injured does not apply for his surrender. In a case—one of murder for example—where there can be no personal application, the State properly takes the place of the individual. And so in all other cases where an indictment has been found, or a warrant of arrest has been issued, the *State* (using the term in its general sense) with which resides the jurisdiction and the power to prosecute, may make the demand, and upon its demand it is the duty of the commanding officer to surrender the party charged. 54, 33. *June, 1892.*

103. The Article contemplates only cases in which an "officer or soldier is accused," &c. So, *held* that it did not apply to a case of a civilian (Chinese) laundryman employed and residing at a military post, accused of a civil crime. The arrest in this case having been made without the knowledge of the commanding officer, *remarked*, that while it is desirable that arrests by the civil authorities of civilians residing upon military reservations should, in general, be made upon application or notice to the proper commanding officer, such a course is a matter of *comity* only and can not be required. 42, 134, *July, 1890.*

104. This Article does not apply to the service, by a sheriff, on an officer or soldier, of a subpoena to appear as a witness before a civil court. In such a case, indeed, the civil official should, as a matter of *comity*, apply first to the post commander, whether or not the post be within the exclusive jurisdiction of the United States. It will then be for the

commander, in comity, to facilitate the service and to issue the necessary permit or order to enable and cause the officer or soldier to attend the court. 35, 284, *September, 1889*.

105. This Article does not apply to a time of war. Where, however, an officer of U. S. Volunteers was charged with forgery, *held* that on presentation of a proper warrant he could, by direction of the Secretary of War, be surrendered to the civil authorities. Cards 4831, *August, 1898*; 4644, *July, 1898*; 5613, *January, 1899*. The Article does not forbid the surrender in time of war, but leaves the matter to the discretion of the proper military authorities. Card 4916, *September, 1898*.

106. It would be entirely proper to surrender a soldier to the civil authorities on a legal warrant for a crime committed before enlistment, but there is no provision of law for his transportation by the Government to the place where he may be wanted. Cards 1872, *November, 1895*; 4780, *August, 1898*.

#### SIXTIETH ARTICLE.

[1] Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

[2] Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

[3] Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

[4] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

[5] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

[6] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting, of any signature upon any writing or other paper, or uses or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

[7] Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any persons having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

[8] Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge

of the truth of the statements therein contained, and with intent to defraud the United States; or

[9] Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or

[10] Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,—

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, *or by any or all of said penalties.*<sup>1</sup> And if any person, being guilty of any of the offences aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

107. The offence known as the duplicating of pay accounts, where it involves, as it generally does, a presenting or a causing to be presented of a false or fraudulent claim against the United States, is properly chargeable under this Article. XXXVII, 356, *February, 1876*; XLII, 569, *March, 1880*.

108. When an officer who had been sentenced to forfeit all pay due, but whose sentence had not yet been approved or published, presented pay accounts to the paymaster for his pay, and received the amount of the same: *held* that he was not triable for the offence of presenting a fraudulent claim under this Article. X, 609, *November, 1864*.

109. Where a soldier, in order to procure his discharge from the service and the payment thereupon of a considerable amount not in fact due him, forged the name of his commanding officer on a discharge paper and a "final statement" paper, and presented the same to a paymaster: *held* that he was chargeable with offences defined in the 2d, 4th and 6th paragraphs of this Article. XXVIII, 668, *June, 1869*.

110. Where an officer, by collusion with a contractor, who had contracted for the delivery of military supplies, received for a pecuniary consideration from the latter a less amount of supplies than the United States was entitled to under the contract, while at the same time giving him a voucher certifying on its face the delivery of the whole amount,—*held* that such officer was chargeable with an offence of the class defined in the 8th paragraph of this Article. XXXV, 206, *February, 1876*.

111. In framing a charge under this Article of knowingly and willfully misappropriating, &c., public funds,<sup>2</sup> it is not necessary to allege

<sup>1</sup> The words in italics were added by act approved March 2, 1901.

<sup>2</sup> "All money lawfully in the hands of a public officer, and for which he is accountable, is money of the United States." *United States v. Watkins*, 3 Cranch C. C., 441.



an intent to defraud the United States. It is the act of the misappropriation described itself which constitutes the offence, irrespective of the purpose or motive of such act. V, 498, *December, 1864*; XXIII, 77-81, *June, 1866*.

112. Where an officer of the Quartermaster Department used teams, tools, and other public property, in his possession as such officer, in erecting buildings, &c., for the benefit of an association, composed mainly of civilians, of which he was a member; *held* that he was properly chargeable with a misappropriation of property of the United States. X, 664, *December, 1864*. And similarly *held* of a loaning by such an officer of public property (corn) to a contractor, for the purpose of enabling him to fill a contract made with the United States through another officer.<sup>1</sup> XXIX, 26, *June, 1869*. The fact that a practice exists in a post or other command of making a use (not authorized by regulation or order) of government property for private purposes, or of loaning it in the prospect of a prompt return, can constitute no defence to a charge for such act as an offence under this Article. Such practice, however, if sanctioned, though improperly, by superior authority, may be shown in evidence in mitigation of sentence. XXIX, 180, *August, 1869*.

113. The offence of stealing, indicated in the 9th paragraph of this Article, consists in a larceny of "property of the United States furnished or intended for the military service." Except in time of war (see FIFTY-EIGHTH ARTICLE), larceny of *other* property can be charged as a military offence only when cognizable under Art. 62, as prejudicing good order and military discipline. See SIXTY-SECOND ARTICLE.

114. SEC. 5494, REVS. STS., provides that the refusal of any person charged with the disbursement of public moneys promptly to transfer or disburse the funds in his hands "upon the legal requirement of an authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, as *prima facie* evidence of such embezzlement." Applying this rule to a military case, it is clear that, in the event of such a refusal by a disbursing officer of the army, the burden of proof would be upon him to show that his proceeding was justified, and that it would not be for the prosecution to show what had become of the funds. So, where an acting commissary of subsistence, on being relieved, failed to turn over the public moneys in his hands to his successor, or to his post commander when ordered to do so, or to produce such moneys, exhibit vouchers for the same, or otherwise account for their use, when so required by his department commander: *held* that he was properly charged with and convicted of

<sup>1</sup> Compare case in G. C. M. O. 46, Hdqrs. of Army, 1869.

embezzlement (the embezzlement now prohibited by this Article). XXII, 548, *June, 1867*.

115. Where a quartermaster used temporarily with his private carriage a pair of government horses in his charge; *held* that he was not properly chargeable with embezzlement, but with the offence (now under this Article) of knowingly applying to his own use and benefit property of the United States, furnished for the military service. IV, 421, *December, 1863*.

116. The *misappropriation* specified in the Article need not be an appropriation for the personal profit of the accused. The words "to his own use or benefit," qualify only the term "applies." XXIII, 77, *June, 1866*.

117. *Held* that under the concluding provision of this Article,<sup>1</sup> a soldier might be brought to trial for an offence of the class specified therein, while held imprisoned, after dishonorable discharge, under a sentence imposed for another offence, provided of course the two years' limitation of Art. 103 had not expired. XXXI, 34, *November, 1870*; I. 673, *July, 1883*.

118. In view of the words, "in the same manner," employed in the last paragraph of this Article, considered in connection with the 77th Article and Sec. 1658, Rev. Sts., *held* that a volunteer or militia officer or soldier could be tried, after his discharge from the service, for a breach of this Article committed while in the service, only by a court composed in the one case of other than regular officers and in the other of militia officers. XIX, 670, *July, 1866*; XXVI, 166, *November, 1867*.

119. In charging embezzlement under this Article, it is not necessary, if the fact sufficiently appears from other allegations, to aver in terms in the specification that the money or property was "furnished or intended for the military service of the United States." XLVII, 476, *September, 1884*.

120. Repeated false statements of the accused relative to the public moneys for which he was accountable are competent evidence going to sustain a charge of embezzlement under this Article. XLVII, 475, *September, 1884*.

121. The application or operation of this Article is in no manner

<sup>1</sup> Whether this provision, in subjecting officers and soldiers discharged, mustered-out, &c., and become *civilians*, to trial by court-martial in the same manner as if they were a part of the army, is constitutional, is a question which is believed not to have been judicially passed upon. Probably originally inserted in the act of March 2, 1865 (from which the Article is repeated), as in the nature of a *war measure*, it was in fact relied upon, as giving jurisdiction, in but a small number of cases even during the war, and since that period the exceptional jurisdiction conferred has been rarely taken advantage of. See § 1931, and note to § 1031, *post*.

affected by the enactment of March 3, 1875, c. 144, constituting embezzlement of public property a felony and making it triable by a U. S. court, such act being a purely civil statute. XLVI, 101, *July, 1882*.

122. Where an officer, for the purpose of obtaining the allowance of a fraudulent claim against the United States, wilfully induced another to make to the United States a lease of premises for public use, containing a false and fraudulent statement, *held* that he was chargeable with an offence of the class specified in the 4th paragraph of this Article. 42, 189, *July, 1890*.

#### SIXTY-FIRST ARTICLE.

Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

123. To constitute an offence under this Article, the conduct need not be "scandalous and infamous." These words, contained in the original article of 1775, were dropped in the form adopted in 1806. Nor is it *essential* that the act should compromise the *honor* of the officer.<sup>1</sup> It is only necessary that the conduct should be such as is at once disgraceful or disreputable and manifestly unbecoming both an officer of the army and a gentleman.<sup>2</sup> An act, however, which is only slightly discreditable is not, in practice, made the subject of a charge under this Article. The Article, in making the punishment of dismissal imperative in all cases, evidently contemplates that the conduct, while unfitting the party for the society of men of a scrupulous sense of decency and honor, shall exhibit him as unworthy to hold a commission in the army. II, 52, *March, 1863*.

124. Knowingly making to a superior a false official report *held* chargeable under this Article. I, 365, *October, 1862*; XXVII, 123, *August, 1868*. So of a deliberately false official certificate as to the truth or correctness of an official voucher, roll, return, &c. XXVII, 200, *October, 1868*. So of any deliberately false official statement, written or verbal, of a material character. XXVII, 123, *supra*. So, where an officer caused the sergeant of the guard to enter in the guard book a false official report that he (the officer) had duly visited the guard at certain hours as officer of the day (when he had in fact not done so), and thereupon himself signed such report and submitted

<sup>1</sup>G. O. 25, Dept. of the Missouri, 1867.

<sup>2</sup>"An officer of the army is bound by the law to be a gentleman." Atty. Gen. Cushing, 9 Opus. 413, 417. See definitions or partial definitions of the class of offences contemplated by this Article, in G. O. 45, Army of the Potomac, 1864; do. 29, Dept. of California, 1865; do. 7, Dept. of the Lakes, 1872; G. C. M. O. 69, Dept. of the East, 1870; do. 41, Hdqrs. of Army, 1879. See also G. O. 12, Dept. of the East, 1895.

it to his post commander; *held* that his conduct was chargeable as an offence under this Article. XLII, 585, *April, 1880.*

125. The following acts, committed in a particular case, *held* to be offences within this Article:—preferring false accusations against an officer; attempting to induce an officer to join in a fraud upon the United States; attempt at subornation of perjury. XXVII, 435, *December, 1868.*

126. An attempt, by corrupt means, to induce an officer to give a vote, as a member of a post council of administration, in favor of a particular candidate for the tradership of the post, *held* properly charged under this Article. XXXVIII, 671, *July, 1877.*

127. *Held* that a surgeon who appropriated to his own personal use, and to that of his private mess, food furnished by the Government for hospital patients, was guilty of an offence under this Article. II, 33, *February, 1863.*

128. The violation by an officer of a promise or pledge on honor, given by him to a superior—in consideration of the withdrawal by the latter of charges preferred for drunkenness—that he would abstain for the future, or for a certain period from the use of intoxicating drink; *held* chargeable under this Article. XXVII, 297, *October, 1868; XXIX, 151, August, 1869.*

129. Where an officer appeared in uniform at a theatre drunk, and conducted himself in such a disorderly manner as to attract the attention of officers and soldiers who were present, as well as the audience generally: *held* that he was properly convicted of a violation of this Article. XXV, 479, *April, 1868.*

130. Engaging, when intoxicated, in a fight with another officer, in the billiard room at a post trader's establishment, in the presence of other officers and of civilians, *held* in the particular case, an offence within this Article. XLII, 478, *January, 1880.* So *held* of an engaging in a disorderly and violent altercation and fight with another officer in a public place at a military post in sight of officers and soldiers. XXVII, 635, *April, 1869.* So *held* of an exhibition of himself by an officer, distinguishable by his uniform, in a public place, in a grossly drunken condition. XXXVIII, 140, *July, 1876.*

131. Gambling with enlisted men (in a public place in this case), *held* an offence within this Article.<sup>1</sup> XXXVII, 127, *March, 1873.* And so of visiting in uniform a disreputable gambling house and gambling with gamblers. XLII, 633, *May, 1880.*

132. To justify a charge under this Article, it is not necessary that the act or conduct of the officer should be immediately connected with or should *directly* affect the military service. It is sufficient that it is

<sup>1</sup> To the same effect, as an early precedent, see G. O. 1, War Dept., 1847.



morally wrong and of such a nature that, while dishonoring or disgracing him as a gentleman, it compromises his character and position as an officer of the army. V, 148, *October, 1864*; XXIV, 555, *May, 1867*; XXVIII, 649, *June, 1869*.

133. Thus, though a mere neglect on the part of an officer to satisfy his private pecuniary obligations will not ordinarily furnish sufficient ground for charges against him (XXVI, 551, *May, 1868*), yet where the debt has been dishonorably incurred, --as where money has been borrowed under false promises or representations as to payment or security, or where the non-payment has been accompanied by such circumstances of fraud, deceit, evasion, denial of indebtedness, &c., as to amount to dishonorable conduct, the continued non-payment, in connection with the facts or circumstances rendering it dishonorable, may properly be deemed to constitute an offence chargeable under this Article.<sup>1</sup> XIII, 425, *February, 1865*; XXIII, 564, *July, 1867*; XXVII, 430, *December, 1868*; XXVIII, 328, *January, 1869*; XXIX, 208, *August, 1869*; XXXIV, 307, *June, 1873*.

134. Where an officer, in payment of a debt, gave his check upon a bank, representing at the same time that he had funds there, when in fact, as he was well aware, he had none; *held* that he was amenable to a charge under this Article. XIII, 207, *January, 1865*.

135. Neglect or refusal to pay honest debts may constitute an offence under this Article, where so repeated or persistent as to furnish reasonable ground for inferring that the officer designs or desires to avoid, or indefinitely defer, a settlement. This, especially, where the debts are due to *soldiers* for money borrowed from, or held in trust for, them. XXI, 635, *September, 1866*; XLII, 54, *November, 1873*.

136. An indifference on the part of an officer to his pecuniary obligations, of so marked and inexcusable a character as to induce repeated just complaints to his military commander or the Secretary of War by his creditors, and to bring discredit and scandal upon the military service, *held* to constitute an offence within the purview of this Article.<sup>2</sup> XXIII, 566, *July, 1867*.

137. Where certain officers of a colored regiment made a practice of

<sup>1</sup> Cases of officers made amenable to trial by court-martial, under this Article, for the non-fulfilment of pecuniary obligations to other officers, enlisted men, post traders and civilians, are found in the following General Orders of the War Dept., and Hdqrs. of Army --No. 87, of 1866; do. 3, 45, 64, of 1869; do. 15, of 1870; do. 17, of 1871; do. 22, 46, of 1872; do. 10, of 1873; do. 25, 50, 68, 82, of 1874; do. 25, of 1875; do. 100, of 1876; do. 48, of 1877; do. 39, 124, of 1885; do. 31, of 1887; do. 54, of 1888; do. 20, of 1890; do. 3, 45, of 1891; do. 45, 65, 106, of 1893; do. 53, of 1894; do. 20, of 1895; do. 38, of 1896; and do. 5, of 1897. For English precedents see James Courts Martial (Collection, Charges, &c.), pp. 303, 396, 510, 618, 622, 686, 797, 802.

<sup>2</sup> See, on the subject of these complaints, the Circular, issued originally from the War Department (A. G. O.), on Feb. 8, 1872, in which the Secretary of War "declares his intention to bring to trial by court-martial," under the first Article of War, "any officer who, after due notice, shall fail to quiet such claims against him."

loaning to men of the regiment small amounts of money, for which they charged and received in payment at the rate of two dollars for one at the next pay day; *held* that they were properly convicted of a violation of this Article. XXIII, 260, *October, 1866*; XXIV, 72, *December, 1866*.

138. *Held* that a continued neglect, without adequate excuse, to satisfy a pecuniary obligation long overdue, after specific assurances given of speedy payment, was a dishonorable act constituting an offence under this Article.<sup>1</sup> 59, 261, *May, 1893*.

139. Where an officer stationed in Utah was married there by a Mormon official to a female with whom he lived as his wife, although having at the same time a legal wife residing in the States; *held* that he might properly be brought to trial by general court martial for a violation of this article. XXIII, 164, *August, 1866*. So *held* of an officer who committed bigamy by publicly contracting marriage in the United States, while having a legal wife living in Scotland whom he had abandoned. XLII, 98, *January, 1879*.

140. Abusing, assaulting, and beating his wife by an officer *held* chargeable as an offence under this Article. XXXI, 400, *May, 1871*.

141. The institution by an officer of fraudulent proceedings against his wife for divorce, and the manufacture of false testimony to be used against her in the suit, in connection with an abandonment of her and neglect to provide for her support, *held* to constitute "conduct unbecoming an officer and a gentleman" in the sense of this Article. XLIII, 21, *October, 1879*; L, 392, 431, *June, 1886*. Similarly *held* with respect to failure on the part of an officer to support his wife and children without adequate excuse therefor. 59, 348, *May, 1893*.

142. According to the accepted principle of interpretation, by which Articles of War enjoining a specific punishment or punishments, are held to be in this particular both mandatory and exclusive, no sentence other than one of simple dismissal can legally be adjudged upon a conviction under this Article. A sentence which adds to dismissal any other penalty or penalties—as disqualification for office, forfeiture of pay, imprisonment, &c., is valid and operative only as to the dismissal, and as to the rest, should be formally disapproved as being unauthorized and of no effect. IV, 283, *October, 1863*; IX, 672, *October, 1864*; XIV, 330, *March, 1865*.

143. The use of abusive language toward a commanding officer may constitute an offence under this Article. But, both as a matter of correct pleading, and because the 20th Article authorizes a punishment

<sup>1</sup>See the recent ruling to a similar effect by the Supreme Court in *Fletcher v. U. S.*, 148 U. S., 84, 91-92; also the same cases in 26 Ct. Cl., 541.

less than dismissal, the language should be so particularized as to show that it constituted an offence more grave than the mere disrespect which is the subject of the latter Article. A specification not thus setting forth and characterizing the epithets or words employed will be subject to a motion to make definite or strike out. LVI, 562, *September, 1888.*

144. The mere acceptance by an officer of compensation from private parties (civilians) whom, by permission of his superior, he assists in a private undertaking, though it may be an indelicate act, is not an offence under this Article. Of the propriety of such conduct an officer must judge for himself. 52, 322, *March, 1892*; 53, 25, *March, 1892.*

145. The duplication of a "pay account," or claim for monthly pay, is always an offence under this Article. It is no defence that the transfer was made before the pay was actually due and payable, *i. e.* before the end of the month. While such a transfer may be inoperative in view of par. 1440, A. R. (1300 of 1895),<sup>1</sup> in so far as that the Government may refuse to recognize it, it is valid as between the officer and the party, and to allow the former to shelter himself behind the regulation would be to permit him to take advantage of his own wrongful and fraudulent act. 51, 370, *January, 1892*; 50, 45, *October, 1891.*

146. The regulation—par. 1440, A. R. (1300 of 1895)<sup>1</sup>—does not assume to invalidate, as between the parties, a transfer made or dated before the last day of the month, nor could it do so. Nor, though the money may not be payable thereon by the paymaster, is the offence of the officer, under this or the 60th Article, any the less. An officer has no right to present for payment and procure to be paid to himself a pay account of which a duplicate remains outstanding in the hands of a *bona fide* transferee. The latter has an equitable, if not a legal, claim to the pay, and this claim can not be ignored by the officer without dishonor. Moreover an officer of the Army has no right to place the military authorities in the position of thus refusing to pay a *bona fide* holder of a draft upon the Treasury. Such an act compromises and discredits the United States and the Government, and is especially an offence in a public officer. 50, 219, *November, 1891.*

147. It is no defence whatever to a charge under this Article that between the date of the refusal by the United States to pay the assignee of a duplicated voucher and the date of the arraignment of the officer or of the service of the charges, the money due has been paid, or somehow secured or made good to the assignee, or that he has been induced to withdraw or suspend his claim against the officer.<sup>2</sup> 50, 45, *October, 1891.*

<sup>1</sup> A. R. 1447 of 1901.

<sup>2</sup> See the remarks of the reviewing authority in the cases published in G. C. M. O. 88 of 1886 and 50 of 1893.

## SIXTY-SECOND ARTICLE.

All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental, garrison, or field-officers' court-martial, according to the nature and degree of the offence, and punished at the discretion of such court.

148. The word "crimes" in this Article, distinguished as it is from "neglects" and "disorders," means military offences of a more serious character than these, including such as are also civil crimes—as homicide, robbery, arson, larceny, &c. "Capital" crimes (*i. e.* crimes capitally punishable), including murder, or any grade of murder made capital by statute, can not be taken cognizance of by courts martial under this Article. I, 473, *December, 1862*; VII, 429, 465, *March and April, 1864*; XI, 176, *November, 1864*; XXIX, 257, *September, 1869*; XXXII, 478, 522, *April, 1872*; XXXIV, 350, 447, *July and September, 1873*; XXXV, 385, *September, 1874*; XXXVI, 364, *April, 1875*; XLI, 50, *November, 1877*. A crime which is in fact murder, and capital by statute of the United States or of the State in which committed, cannot be brought within the jurisdiction of a court-martial under this Article, by *charging* it as "manslaughter, to the prejudice," &c., or simply as "conduct to the prejudice," &c.<sup>1</sup> If the specification, or the proof, shows that the crime was murder and a capital offence, the court should refuse to take jurisdiction, or to find or sentence. If it assume to do so, the proceedings should be disapproved as unauthorized and void. XXXIII, 155, *July, 1872*; XXXIV, 250, *May, 1874*; XLII, 451, *December, 1879*.

149. The term "to the prejudice of good order and military discipline," qualifies, according to the accepted interpretation, the word "crimes" as well as the words "disorders and neglects." Thus, the crime of *larceny* (sometimes charged as "theft" or "stealing") is held chargeable under this Article, when it clearly affects the order and discipline of the military service. Stealing, for example, from a fellow soldier or from an officer (or stealing of public money or other public property, where the offence is not more properly a violation of Art. 60) is generally so chargeable. XXIV, 441, *April, 1867*; XXVI, 23, 439, 487, *September, 1867, to March, 1868*; XXXVI, 214, *January, 1875*; XXXIX, 47, *December, 1876*. And so of any other crime (not capital), the commission of which has prejudiced military discipline. As for example, manslaughter (or homicide not amounting to murder—

<sup>1</sup> See this opinion, as given in an important case, adopted by the Secretary of War in his action on the same published in G. C. M. O. 3, War Dept., 1871; also the similar rulings in G. C. M. O. 28, Dept. of Texas, 1875, G. O. 14, Dept. of Dakota, 1868; do. 104, Army of the Potomac, 1862. As to the jurisdiction of courts martial in cases of murder, &c., *in time of war*, see FIFTY-EIGHTH ARTICLE.



see § 148, *ante*) of a soldier (XXV, 392, *June, 1868*; XXXI, 87, *December, 1870*; 278, *April, 1871*; XXXIII, 155, *July, 1872*; XXXVI, 667, *September, 1875*; XXXVII, 380, *March, 1876*; XLI, 188, *April, 1878*); assault with intent to kill a fellow soldier (XXVII, 587, 654, *March and May, 1869*); forgery of the name of a disbursing or other military officer to a government check or draft (XXIX, 369, *October, 1869*); or forgery of an officer's name to a check on a bank (XXXII, 623, *May, 1872*) whether or not anything was in fact lost by the Government or the bank or officer; forgery in signing the name of a fellow soldier to a certificate of indebtedness to a sutler (IX, 328, *July, 1864*); or to an order on a paymaster (XLII, 562, *March, 1880*); embezzlement or misappropriation of the property of an officer or soldier. XXXIX, 201, *October, 1877*.

150. *Held* that for an officer to print and publish to the army a criticism upon an official report, made by another officer in the course of his duty to a common superior, charging that such report was erroneous and made with an improper and interested motive, was erroneously and made with an improper and interested motive, was gravely unmilitary conduct to the prejudice of good order and military discipline. An officer who deems himself wronged by an official act of another officer should prefer charges against the latter or appeal for redress to the proper superior authority. He is not permitted to resort to any form of *publication* of his strictures or grievances. XXXIX, 431, *February, 1878*. So *held* that for an officer to publish or allow to be published in a newspaper of general circulation, charges and insinuations against a brother officer by which his character for courage and honesty is aspersed and he is held up to odium and ridicule before the army and the community—was a highly unmilitary proceeding and one calling for a serious punishment upon a conviction under this Article, and this whether or not the charges as published were true. XLII, 284, *May, 1879*.

151. A crime, disorder, or neglect, cognizable under this Article, may be charged either by its name simply, as "larceny," "drunkenness," "neglect of duty," &c.; or by its name with the addition of the words, "to the prejudice of good order and military discipline;" or simply as "conduct to the prejudice of good order and military discipline;" or as "violation of the 62d Article of War." It is immaterial in which form the charge is expressed, provided the specification sets forth facts constituting an act prejudicial to good order and military discipline. VII, 485, *March, 1864*; IX, 328, *March, 1864*; XI, 228, *December, 1864*; XXVIII, 486, *April, 1869*. Whenever the charge and specification *taken together* make out a statement of an act clearly thus prejudicial, &c., the pleading will be regarded as substan-

tially sufficient under this general Article. XVI, 310, 551, *June and September, 1865.*

152. A charge of "conduct to the prejudice," &c., with a specification setting forth merely trials and convictions of the accused for previous offences, is not a pleading of an offence under this Article, or of any military offence. XXVII, 331, *November, 1868.* So of a charge of "habitual drunkenness to the prejudice," &c., with a specification setting forth instances in which the accused has been sentenced for acts of drunkenness. XXXIII, 175, *July, 1872.* Such charges indeed are in contravention of the principle that a party shall not be twice tried for the same offence. So, a specification under the charge of "conduct to the prejudice," &c., which sets forth not a distinct offence but simply the result of an aggregation of similar offences, is insufficient in law. XXXVI, 432, *May, 1875.* Where the specifications to such a charge, in a case of an officer, set forth that the accused was "frequently" drunk, "frequently" absented himself without authority from his command, &c., *held* that these specifications were properly struck out by the court on the motion of the accused. In such a case the only correct pleading is a general charge under this Article, with specifications setting forth—each separately—some particular and specific instance of offence. XXXVIII, 211, *August, 1876.*

153. *Held* that a specification alleging homicide, but not adding "with malice aforethought," or in terms to that effect, was a pleading of manslaughter only and thus within this Article. XLVII, 385, *July, 1884.*

154. The withdrawing by a disbursing officer of the Army from an authorized depository of public funds for a purpose not prescribed or authorized by law—as for personal use, or to pay claims not due from the United States or payable by such officer—being a form of embezzlement defined by section 5488, Rev. Sts., is properly charged as embezzlement under this article. XXV, 588, *May, 1868*; XXVII, 414, *December, 1868*; XXXIII, 291, 495, *September and November, 1872*; XXXVIII, 96, *May, 1876.* Though the offence may in terms be laid as a violation of the act of 1866 (5488, Rev. Sts.), it is, indeed, only a form of a charge of violation of the 99th (now 62nd) Article of War,<sup>1</sup> the act of Congress merely furnishing a definition of the

<sup>1</sup>An examination of the opinions in the cases upon which the text is based discloses the fact that the distinction between the character of the general offence of embezzlement and the particular embezzlement defined in the act of June 14, 1866, now sec. 5488, Rev. Sts., is clearly set out and defined, the difference being so marked that it would be an error to charge the acts set out in the latter statute as a violation of the 60th article of war. These opinions were rendered with reference to the trials of officers, which trials were published in the following general court-martial orders of the War Department—43, 86, of 1868; 27, 31, of 1872, and 7, of 1873.

In all of these cases, except the last one, the officers were tried, among other offences, for illegally withdrawing from the authorized depositories or applying to a purpose not authorized by law, money intrusted to them, and in each of these cases the money so withdrawn or misapplied was furnished or intended for the military

offence. The act, it may be added, furnishes also a measure of punishment which may properly aid, though it need not necessarily govern, service, but the offences were charged under the act of June 14, 1806, now sec. 5488, Rev. Sts., and *not* under what is now subdivision 9 of the 60th article of war.

The officer named in the last order was tried under the act of March 2, 1863, now the 60th article of war, for embezzlement, and not for any acts legitimately chargeable under the act of June 14, 1806.

In remarking upon the general offence of embezzlement as then set out in the 49th Article of War of the articles of 1806, and upon the embezzlement defined in the act of June 14, 1806, Judge-Advocate General Holt, in his opinion upon the case in *G. C. M. O.*, 34, *supra*, says: " \* \* \* The court may well be supposed to have construed the 49th Article as contemplating an embezzlement or misappropriation with fraudulent intent, and to have acquitted on the ground that there was upon the testimony a reasonable doubt as to the existence of such intent. But if that conclusion be accepted, the fact remains that no such construction could properly govern in connection with the other charge (embezzlement) under the act of June 14, 1806. The statute of 1806, in view of which it was preferred, is the expression of extreme vigilance in regard to the proper use and disposition of the public moneys, founded by the experience of the Government to have become imperatively necessary to be observed. It provides an additional safeguard of the public treasury by enacting that any disbursing officer who shall withdraw, transfer, or apply any of the public funds entrusted to him for any purpose not authorized by law shall be deemed guilty of a felony in embezzlement and be punished accordingly. The intent of the officer, whether innocent or fraudulent, enters in no manner into the statutory offence. If his act of withdrawal, application, etc., of the funds is simply one not authorized by existing law, he is guilty of the crime here defined by Congress. His intent, if innocent, may perhaps be considered in mitigation of punishment, but can not be relied upon as a legal bar against conviction. The offence created by this act belongs to the class known as *malum prohibitum*, but it is upon the repression of this class of offences that the safety of the public treasury largely depends."

In the publication to the Army of this case, the Secretary of War, approving the views of Judge-Advocate General Holt, said: "In the opinion of the Secretary of War, they might well have convicted the accused of at least a portion of the charged violations of the act of June 14, 1806 (now sec. 5488, Rev. Sts.), a statute enacted for the more complete protection of the Treasury, \* \* \* and which without regard to the effect of the offender denounces all withdrawals from a public depository or dispositions of public moneys not authorized by express law."

As a rule, therefore, acts defined in sec. 5488, Rev. Sts., have been brought to trial as embezzlement under this section in violation of the 62d article of war, and *not* under the 60th article of war.

See in this connection in addition to the cases already cited those published in the following general court-martial orders: (War Department) 5, of 1869; 21, 58, 81, of 1874; 52, of 1877; 5, of 1881; 36, of 1883.

See also S. O. 172, A. G. O., of 1899 (order publishing case of Capt. O. M. Carter, Corps of Engineers). See farther, *O. M. Carter v. McLaughry* (105 Fed. Reporter, p. 614). In the latter case the court, *inter alia*, said: "It is also contended that under the sixty-second article of war no charge can be preferred that is embraced in any other article, and that as the charge is that of embezzlement it is covered by either the first, fourth, or ninth paragraph of the sixtieth article of war. Assuming, but not deciding, that no charge can be laid under the Sixty-second Article of War if it is mentioned in any preceding article, still it is apparent that the embezzlement defined in section 5488, Revised Statutes, is not the offence denounced in either the first or fourth paragraph referred to, and I am also of the opinion that it is a species of embezzlement different from that defined in the ninth paragraph of the Sixtieth Article of War, since the money which is the subject of embezzlement under the latter article is money 'furnished for military service,' whereas under section 5488, the term 'money' comprehends any public money, whether appropriated for the military service or for other purposes. The offence denounced in section 5488 is much broader and more comprehensive than the other, the former being the application by a disbursing officer of money to any unauthorized purpose, whilst under the ninth paragraph mentioned the money which is the subject of the embezzlement is money appropriated specifically for the military service, and it is quite probable from the context of the entire paragraph that the term 'embezzlement,' as there employed, means such an offence as is generally understood where one having the money of another in his custody appropriates it to his own use with felonious intent, intending to deprive the true owner thereof."

the discretion of a court martial in imposing sentence. XXXIII, 495, *November, 1872*. But *held*, that to constitute such embezzlement it is not necessary that there should have been a personal conversion of the funds or an intent to defraud. The object of the law is to provide a safeguard against the misuse and diverting from their appointed purpose of public moneys, and the intent of the offender, whether fraudulent or not, enters in no respect into the statutory crime.<sup>1</sup> If the withdrawal or application of the funds is simply one not prescribed or authorized by law, the offence is complete.<sup>2</sup> XXV, 588, *May, 1868*; XXVII, 116, *July, 1868*; XXXIII, 494, *November, 1872*; XXXVIII, 396, *May, 1876*. An absence, however, of criminal motive in the illegal act may be shown in mitigation of sentence in a military case. XXXIII, 494, *supra*. So, *held*, that it constituted no *defense* to a charge of an embezzlement of this class (though it might be shown in mitigation of punishment) that the officer had restored to the public depository the funds illegally withdrawn by him before a formal demand was made for the same. XXV, 588, *supra*.

155. It is a defence to a charge (under this Article) of the embezzlement defined in Sec. 5490, Revised Statutes, as consisting in a failure to safely keep public moneys by an officer charged with the safe-keeping of the same, that the funds alleged to have been embezzled were, without fault on the part of the accused, lost in transportation or fraudulently or feloniously abstracted. I, 435, *November, 1862*.

156. In view of the injunction and definition of Secs. 3622 and 5491, Rev. Sta., an officer who, in his official capacity, receives public money (not pay or an allowance) which he fails duly to account for to the United States, is guilty of embezzlement. The statute makes no distinction as to the sources from which the money is derived or the circumstances of its receipt. Nor is it material whether or not the officer actually converted it to his own use or what was the motive of his disposition of it. So *held* that an officer who, having claimed and exacted certain moneys of the United States from government contractors, failed to pay the same into the Treasury, or to duly account therefor, was guilty of embezzlement under this Article. 52, 138, *February, 1872*.

157. Where an officer allowed to an enlisted man and paid to him, out of certain public funds consisting of the proceeds of a public sale of condemned quartermaster stores, an amount of ten per centum on the total of such proceeds, as a compensation for the services of such man as auctioneer at the sale, *held* that such payment was illegal and unau-

<sup>1</sup> See remarks of the Secretary of War in G. C. M. O., 34, War Department, 1872, quoted in preceding note.

<sup>2</sup> Compare 14 Opns. At. Gen., 473.



thorized<sup>1</sup> and constituted an embezzlement of public money chargeable under this Article. 59, 201, *April, 1863*.

158. Whether acts committed against *civilians* are offences within this Article is a question to be determined by the circumstances of each case, and in regard to which no general rule can be laid down. If the offence be committed on a military reservation, or other premises occupied by the army, or in its neighborhood so as to be—so to speak—in the constructive presence of the army; or if committed by an officer or soldier while on duty, particularly if the injury is done to a member of the community whom the offender is specially required to protect; or if committed in the presence of other soldiers, or while the offender is in uniform; or if the offender use his military position or that of another for the purpose of intimidation or other unlawful influence or object—the offence will in general properly be regarded as an act prejudicial to good order and military discipline and cognizable by a court martial under this Article. The judgment on the subject of a court of military officers, experts as to such cases, confirmed by the proper reviewing commander, should be reluctantly disturbed.<sup>2</sup> XLIX, 268, *August, 1885*; 28, 207, *November, 1888*; 34, 381, *August, 1889*; 36, 151, *October, 1889*.

159. The following offences have been held properly charged or chargeable under this Article, as *disorders or neglects* "to the prejudice of good order and military discipline:" Drunkenness or drunken and disorderly conduct, at a post or in public, committed by a soldier or officer when not "on duty," and when the act (in the case of an officer) does not more properly fall within the description of Art. 61. I, 463, *December, 1862*; VIII, 366, *May, 1864*; XXIV, 79, *December, 1866*; XXVIII, 575, *May, 1869*. Escape from military confinement or custody (where not amounting to desertion—see § 1057, *post*.) X, 574, *November, 1864*. Breach of arrest (where not properly chargeable under Art. 65). XXIX, 175, *August, 1869*. Disclosing a finding or sentence of a court martial in contravention of the oath prescribed in Art. 84 or 85. XXI, 628, *September, 1866*. Refusal by an officer or soldier to testify, when duly required to attend and give evidence as a witness before a court martial. XLII, 596, *April, 1880*. Joining with other inferior officers of a regiment in a letter to the colonel, asking him to resign. XLI, 226, *May, 1878*. Neglecting, by a senior officer "present for duty" with his regiment, to assume the command of the same when properly devolved upon him, and allowing such command to be exercised by a junior. XI,

<sup>1</sup> See opinion of the Second Comptroller of the Treasury published in Cir. No. 3, A. G. O., 1894.

<sup>2</sup> See par. 7, p. 17, Court-Martial Manual of 1901.

172, *November, 1864*. Culpable malpractice by a medical officer in the course of his regular military duty. II, 378, *May, 1863*. Colluding with bounty brokers in procuring fraudulent enlistments to be made and bounties to be paid thereon. XIV, 326, *May, 1865*. Violations, by an officer, of army regulations,<sup>1</sup> in bidding-in and purchasing, through another party, public property sold at auction by himself as quartermaster; also, in purchasing subsistence stores, ostensibly for domestic use, but really for purposes of traffic. XXXIX, 283, *November, 1877*. Causing (by a quartermaster) troops to be transported upon a steamer known by him to be unsafe. XV, 301, *June, 1865*. Paying money due under a contract (for military supplies) to a party to whom, with the knowledge of the accused, the contract had been transferred in contravention of Sec. 3737, Rev. Sts. XLII, 44, *November, 1878*. Inciting (by an officer) another officer to challenge him to fight a duel. XXVIII, 650, *June, 1869*. Assuming (by a soldier) to be a corporal in the recruiting service, and as such enlisting recruits and obtaining board and lodging for himself and recruits without paying for same. XXXIX, 229, *October, 1877*. Procuring (by a soldier) whiskey from the post trader by forging an order for the same in the name of a laundress. XXXVII, 270, *January, 1876*. Breach of faith (by a soldier) in refusing to pay the post trader for articles obtained on credit, upon orders on him which had been guaranteed or approved by the company commander upon the condition that the amounts should be paid on the next pay-day. XXVII, 282, *September, 1868*; 503, *March, 1869*; XXVIII, 208, *January, 1869*; XXIX, 574, *January, 1870*. Gambling by officers or soldiers under such circumstances as to impair military discipline (where the conduct, in the case of an officer, does not rather constitute an offence under Art. 61). XXXI, 404, *May, 1871*. Striking a soldier, or using any unnecessary violence against a soldier—by an officer. 39, 25, *February, 1860*. Neglect on the part of an officer of engineers to oversee the execution of a contract for a public work placed under his charge, the due fulfillment of such charge being a military duty.<sup>2</sup> 31, 357, *April, 1889*. A public criticism in a newspaper, by an officer, of a case which had been investigated by a court martial and was awaiting the action of the President. L, 86, *March, 1886*. Assuming, by an officer, to copyright as owner, and thus asserting the exclusive right to publish, in an abridged form, the Infantry Drill Regulations, property of the United States, and the formal official publication of which had already been announced in orders by the Secretary of War. 50, 373, *December, 1891*;

<sup>1</sup> Violations of Army Regulations in general are properly chargeable as neglects (or disorders) to the prejudice of good order and military discipline.

<sup>2</sup> See Runkle v. U. S., 19 Ct. Cls., 396, 411, 412.

62, 156, *October, 1893*. Selling condemned military stores, by an officer, without due notice, and not suspending the sale when better prices could have been obtained by deferring it, in violation of army regulations. 50, 446, *December, 1891*. Misconduct by a soldier at target practice, consisting of breaches of the published instructions, false statements or markings with a view fraudulently to increase a score, &c. 20, 357, *November, 1887*; 21, 256, *December, 1887*. Violation, by a soldier, of a pledge given to his commanding officer to abstain from intoxicating liquors, on the faith of which a previous offence was condoned. 44, 11, *November, 1890*. Bigamy, by a soldier, committed at a military post. 21, 430, *January, 1888*.

160. The following acts have been held *not* to be cognizable as offences under this Article: A mere breach of the peace committed by a soldier (while absent alone and at a distance from his post) in a street of a city, and in violation of a municipal ordinance. XXXIII, 277, *August, 1872*. Pecuniary transactions between enlisted men of a culpable character, but in their private capacity and not directly affecting the service or impairing military discipline. XI, 490, *February, 1865*; XVIII, 380, *November, 1865*; XXXVI, 480, *May, 1875*. Speculating and gambling in stocks by a disbursing officer, the proper performance of whose military duty was not affected. (But *recommended* that he be relieved from the duty of disbursing public money.) XVII, 22, *July, 1865*. Reenlisting by the procurement of the recruiting officer, after having been discharged for a disability still continuing; the act being in good faith, and the alleged offence being committed before the party could be said to have fully come into the service. VI, 203, *June, 1864*. A resort to civil proceedings by suit against a superior officer on account of acts done in the performance of military duty. But *held* that, if the verdict should be for the defendant, and it should appear that the suit was without probable cause and malicious, a charge under this Article might perhaps be sustainable. 48, 3, *January, 1891*. The mere loaning of money at usurious or excessive rates of interest by a noncommissioned officer to privates, unless it should clearly be made to appear that such conduct promoted desertions or other results prejudicial to the discipline of the command; but as the practice in this case had been long continued, and was clearly demoralizing, *advised* that the noncommissioned officer be summarily discharged. 53, 173, *April, 1892*. The becoming infected, by a soldier, with a disease unfitting him for service, as the result of vicious conduct. 61, 396, *September, 1893*.

<sup>1</sup>See S. D. 206, Dept. Mo. 1895, do 5, *et al.*, 1896, and the order prescribing maximum punishments. Court-Martial Manual [1901], p. 54.

## SIXTY-THIRD ARTICLE.

All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.

**161.** The accepted interpretation of this Article is that it subjects (in time of war) the classes of persons specified, not only to military discipline and government in general, but also to the jurisdiction of courts martial, upon the theory, probably, that they are thus made for the time being a part of the army. Individuals, however, of the class termed "*retainers to the camp*," or officers' servants and the like, as well as camp followers generally, have rarely been subjected to trial in our service. For breaches of discipline committed by them, the punishment has generally been expulsion from the limits of the camp and dismissal from employment. XXIII, 331, *November, 1866*.

**162.** The discipline authorized by the Article has mainly been applied to the description of "persons serving with the armies of the United States in the field,"—that is to say, civilians serving in a quasi military capacity in connection with troops, in time of war and on its theatre. Thus, during the war of the rebellion, civilians of the following classes were, in repeated cases, held amenable, under this Article, to the military jurisdiction, and subjected to trial and punishment by courts martial:—Teamsters employed with wagon trains, watchmen, laborers and other employees of the quartermaster, subsistence, engineer, ordnance, provost-marshal, &c., departments; ambulance drivers; telegraph operators; interpreters; guides; paymasters' clerks; veterinary surgeons; "contract" surgeons; nurses and hospital attendants; conductors and engineers of railroad trains operated upon the theatre of war for military purposes; officers and men employed on government transports, &c. VII, 116, *February, 1864*; IX, 111, 146, *May, 1864*; XI, 493, *March, 1865*; XII, 376, *March, 1865*; XIII, 459, *March, 1865*. But the mere fact of employment by the government pending a general war, does not render the civil employee so amenable. The employment must be in connection with the army in the field and on the theatre of hostilities. VII, 453, *September, 1863*; 511, *April, 1864*. The forfeitures adjudged by courts martial against such civilian employees should be withheld from their pay and allowed to remain in the appropriation to which such pay pertains. Card 9326, *November, 1900*.

**163.** *Held* (June, 1863) that the force employed in the "Ram Fleet" on western waters was properly a contingent of the army rather than of the navy, and accordingly that civilian commanders, pilots and engineers employed upon such fleet during the war and before the enemy, were persons serving with the armies in the field in the sense of this

Article, and, therefore, amenable to trial by court martial. II, 570, *June, 1863*.

164. Civil employees of the United States serving with the army in the field during active warfare with hostile Indian tribes, *held* amenable to trial by court-martial under this Article. XXXII, 386, *March, 1872*. A civilian who acted as guide to a command operating in a hostile movement during an Indian war, *held* so triable. XXXVI, 435, *May, 1875*.

165. The jurisdiction authorized by this Article cannot be extended to civilians employed in connection with the army *in time of peace*, nor to civilians employed in such connection during the period of an Indian war but not on the theatre of such war. XXXVIII, 557, *April, 1877*. In view of the limited theatre of Indian wars, this exceptional jurisdiction is to be extended to civilians, on account of offences committed during such wars, with even greater caution than in a general war. XXXVIII, 641, *June, 1877*.

166. Civilians cannot legally be subjected to military jurisdiction by the authority of this Article *after* the war (whether general or against Indians), pending which their offences were committed, has terminated. The jurisdiction, to be lawfully exercised, must be exercised *during* the *status belli*. XXXVIII, 641, *supra*.

167. A civil employee of the United States in time of peace is most clearly not made amenable to the military jurisdiction and trial by court martial by the fact that he is employed in an office connected with the administration of the military branch of the government. Such employment does not make him a part of the military establishment, nor is his offence, however nearly it may affect the military service, "a case arising in the land forces" in the sense of Article V of the Amendments to the Constitution. So *held*, that a civilian clerk employed in time of peace in the office of the chief quartermaster at San Francisco was manifestly not amenable, under this Article or otherwise, to trial by court martial for the embezzlement or misapplication of government funds appropriated for the Quartermaster Department.<sup>1</sup> And remarked that if this official could be made liable to such jurisdiction, all the male and female clerks employed in the War Department might upon the same principle be held thus amenable for offences against the Government committed in connection with their duties. XXXVIII, 559, *April, 1877*. And so *held* in the case of a civilian clerk employed at Camp Robinson, Nebraska, charged with conspiring with contractors to defraud the United States; the post not being

<sup>1</sup>See the confirmatory opinion in this case of the Attorney General of May 15, 1878—16 Opans. 13.

within the theatre of any Indian war or hostilities pending at the period of the offence.<sup>1</sup> XXXVIII, 641, *June, 1877*.

168. *Held*, that superintendents of national cemeteries, being no part of the army, but civilians (see Sec. 4874, Rev. Sts.) were clearly not amenable to military jurisdiction or trial under this Article or otherwise.<sup>2</sup> XXXVIII, 557, *April, 1877*.

#### SIXTY-FOURTH ARTICLE.

The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial.

169. It is a general principle, confirmed by this Article, that military offences are not territorial.<sup>3</sup> So, *held* that an officer who exhibited himself in an intoxicated condition at a public ball in Mexico, though not present in any military capacity, was amenable for his offence to the jurisdiction of a court martial in Texas. 48, 52, *January, 1891*.

#### SIXTY-FIFTH ARTICLE.

Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service.

170. The term "crime" is here employed in a general sense, referring to offences of a military character, as well as to those of a civil character which are cognizable by court martial.<sup>4</sup> An offence in violation of this Article is only committed when an officer, confined in "close arrest" to his quarters, leaves the same without authority. VII, 143, *February, 1864*; XXV, 518, *May, 1868*. A breach of any arrest, not accompanied by confinement to quarters, would be an offence not within this Article, but under Art. 62. V, 122, *October, 1863*; XI, 127, *November, 1864*.

171. Simply disobeying an order to proceed and report in arrest to a certain commander, *held* not an offence chargeable under this Article. XXXI, 606, *August, 1871*.

172. Where an officer in close arrest was permitted by his commanding officer to leave temporarily his confinement, *held*, that his delaying his return, for a brief period beyond the time fixed therefor, did not

<sup>1</sup>See opinion, to a similar effect, of the Attorney General, of June 15, 1878—16 Opins. 48.

<sup>2</sup>See, to the same effect, the opinion of the Attorney General referred to in note 1, *supra*.

<sup>3</sup>See Manual for Courts-Martial (1901), par. 3, p. 14.

<sup>4</sup>Compare *Wolton v. Gavin*, 16 Ad. & El., 66, 68; *Simmons*, § 360.



properly constitute an offence under this Article. XXX, 562, *August, 1870*.

173. Though any unauthorized leaving of his confinement by an officer in close arrest is, strictly, a violation of the Article, it would seem, in view of the severe mandatory punishment prescribed, that an officer should not in general be brought to trial under the same unless his act was of a reckless or deliberately insubordinate character.<sup>1</sup> V, 122, *October, 1863*; XXVII, 136, *August, 1868*.

174. The requirement of this Article, that an offender "shall be dismissed," is held to be exclusive of any other punishment. A sentence of dismissal, with forfeiture of pay, is unauthorized and inoperative as to the forfeiture, and as to this, should be disapproved. VIII, 296, *April, 1864*.

#### SIXTY-SIXTH ARTICLE.

Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.

175. Soldiers held in military arrest, while they may be subjected to such restraint as may be necessary to prevent their escaping or committing violence, cannot legally be subjected to any punishment; the imposition of punishment upon soldiers while thus detained has been on several occasions emphatically denounced by department commanders.<sup>2</sup> XXXI, 397, *August, 1871*.

176. The word "crimes," as used in this Article, is construed to mean serious military offences. So that a soldier should not ordinarily be "confined" when not charged with one of the more serious of the military offences—in other words, when charged only with an offence of a minor character. 36, 78, *October, 1889*; 50, 141, *November, 1891*.

#### SIXTY-SEVENTH ARTICLE.

No provost marshal, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.

#### SIXTY-EIGHTH ARTICLE.

Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in

<sup>1</sup> It is no defence to a charge of breach of arrest in violation of this Article, that the accused is innocent of the offence for which he was arrested. Hough (Practice), 494; *id.* (Precedents), 19.

<sup>2</sup> See, for example, the remarks of such commanders in G. O. 23, Dept. of the East, 1863, do. 26, Dept. of California, 1866, do. 23, Dept. of the Lakes, 1870, do. 106, Dept. of Dakota, 1871. And compare remarks of Justice Story in Steerer, Field, 2 Mason, 486, 516.

writing, to the commanding officer, the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

#### SIXTY-NINTH ARTICLE.

Any officer who presumes, without proper authority, to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

#### SEVENTIETH ARTICLE.

No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.

177. Detaining soldiers in arrest for long and unreasonable periods, when it is practicable to bring them to trial, is arbitrary and oppressive, and in contravention both of the letter and spirit of this Article. Whether the delay in any case is to be regarded as so far unreasonable as properly to subject the commander responsible therefor to military charges or a civil action, must depend upon the circumstances of the situation and the exigencies of the service at the time.<sup>1</sup> XXX. 405, *June, 1870*; XXXI. 597, *August, 1871*.

#### SEVENTY FIRST ARTICLE.

When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.

178. Though an officer, in whose case the provisions of this Article in regard to service of charges and trial have not been complied with, is *entitled* to be released from arrest, he is not authorized to release himself therefrom. If he be not released in accordance with the Article, he should apply for his discharge from arrest, through the proper channels, to the authority by whose order the arrest was imposed, or other proper superior. VII. 163, *February, 1864*; VIII. 61, *March, 1864*; IX. 467, 550, *August, 1864*; XVIII. 161, *September, 1865*; XXIV. 387, 580, *March and May, 1867*.

179. The term "within ten days thereafter," *held* to mean after his arrest. IX. 572, *September, 1864*.

180. *Held* a sufficient compliance with the requirement as to the

<sup>1</sup> Compare *Blake's Case*, 2 Maule & Sel., 428; *Barley v. Warden*, 4 *id.*, 400.



service of charges, to have served a true copy of the existing charges and specifications, though the list of witnesses appended to the original charges was omitted (see CHARGE); and though the charges themselves were not in sufficient legal form, and were intended to be amended and re-drawn. XXV, 350, *February, 1868*.

181. The fact that cases of officers put in arrest "at remote military posts or stations" are excepted from the application of the Article, does not authorize an abuse of the power of arrest in these cases. And where, in such a case, an arrest, considering the facilities of communication with the department headquarters and other circumstances, was in fact unreasonably protracted without trial, *held* that the officer was entitled to be released from arrest upon a proper application submitted for the purpose. XXXII, 195, 484, *January and April, 1872*.

#### SEVENTY-SECOND ARTICLE.

Any general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department may appoint general courts-martial, whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.

182. This Article specifies by what military officers a general court-martial may be constituted. The President of the United States has the power to order such a court, as the constitutional Commander-in-chief of the Army, irrespective of this Article or other statute.<sup>1</sup> XXXIII, 603, *December, 1872*. (See §§ 2038 and 2039, *post*.)

183. This Article, in empowering certain commanders to constitute the superior courts martial, makes them the judges in general of the expediency of ordering such courts in particular instances. Except where specially authorized to do so by law or regulation, an officer or soldier can not demand a court-martial in his own case. XXXIV, 413, *August, 1873*.

184. Where a commander empowered by this Article to convene a general court martial, declines, in the exercise of his discretion, to approve charges submitted to him by an inferior and to order a court thereon, his decision should in general be regarded as final. XXXII, 323, *February, 1872*.

185. The authority to order a court under this Article is an attribute of command. Thus a department commander, detached and absent from his command for any considerable period by reason of having received a leave of absence (whether of a formal or informal character), or having been placed upon a distinct and separate duty (as that of a

<sup>1</sup>See *Swain v. U. S.*, 28 Ct. Cl., 173; and 165, U. S., 553, 559.

member of a court or board convened outside his department, for example), is held to be in a status incompatible with a full and legal exercise of such authority, and therefore incompetent during such absence to order a general court martial as department commander, even though no other officer has been assigned or has succeeded to the command of the department.<sup>1</sup> XLIV, 63, *July, 1880*. (See ONE HUNDRED AND FOURTH ARTICLE.) Nor can a department commander thus absent, *delegate* such authority to a staff officer or other subordinate, to be exercised by him. XLIII, 264, 279, *March and April, 1880*; Card 1429, *July, 1895*. Nor, where a general court martial duly convened by a department commander, has, at a time when the commander is thus absent from his command, been reduced, by an incident of the service, below five members, can another member legally be detailed upon the court, by the assistant adjutant general, or other subordinate officer remaining in charge of the headquarters; since such a detail would be an exercise of a portion of the authority vested by this Article in the commander, and which can in no part be delegated. XLIII, 332, *June, 1880*. (See SEVENTY-FIFTH ARTICLE.)

186. It is not essential that the commander who convenes the court-martial for the trial of an officer should sign the charges to make him the "accuser or prosecutor" within the meaning of this Article. Nor is the fact that they have been signed by another conclusive on the question whether the convening commander is the actual accuser or prosecutor. The objection that such commander is such calls in question the legal constitution of the court, and while, such objection, if known or believed to exist, should regularly be interposed at or before the arraignment, it may be taken during the trial at any stage of the proceedings.<sup>2</sup> If not admitted by the prosecution to exist, the accused is entitled to prove it like any other issue. I, 430, *November, 1862*; VIII, 38, *March, 1864*.

187. Whether the commander who convened the court is to be regarded as the "accuser or prosecutor" in the sense of the Article in question, where he has had to do with the preparing and preferring of the charges, is mainly to be determined by his *animus* in the matter. He may like any other officer *initiate* an investigation of an officer's conduct and formally prefer, as his individual act, charges against such officer; or by reason of a personal interest adverse to the accused he may adopt practically as his own, charges initiated by

<sup>1</sup> See G. C. M. O. 9, Dept. of Columbia, 1880; and par. 195, A. R., as amended by G. O. 20, A. G. O., 1901. (A. R. 213 of 1901.)

<sup>2</sup> Or it may be taken to the reviewing officer with a view to his disapproving the sentence, or may be made to the President after the approval and execution of the sentence with a view to having the same declared invalid or to the obtaining of other appropriate relief.

another; in which cases he is clearly the accuser or prosecutor within the Article. On the other hand, it is his duty to determine when the facts are brought to his knowledge, whether an officer within his command charged with a military offence, shall in the interest of discipline and for the good of the service be brought to trial. To this end he may formally refer or revise or cause to be revised and then formally referred charges preferred against such officer by another; or when the facts of an alleged offence are communicated to him, he may direct a suitable officer, as a member of his staff, or the proper commander of the accused, to investigate the matter, formulate and prefer such charges as the facts may warrant, and having been submitted to him, he may revise and refer them for trial as in other cases; all this he may do in the proper performance of his official duty without becoming the accuser or prosecutor in the case.<sup>1</sup> Of course, he cannot be deemed such accuser or prosecutor where he causes charges to be preferred and proceeds to convene the court by direction of the Secretary of War or a competent military superior. VII, 5, *January, 1864*; XIV, 285, *March, 1865*; XXX, 170, *March, 1870*; XXXII, 78, *October, 1871*; 278, *July, 1872*; XXXIV, 104, *February, 1873*; XXXVII, 189, *December, 1875*; XLII, 626, *May, 1880*; LV, 220, *December, 1887*; 369, *March, 1888*; Cards 2240, *May, 1896*; 3913, *March, 1898*.

188. But where the officer who made an investigation recommended that charges be not preferred and the department commander nevertheless directed that charges be prepared and brought the accused officer to trial thereon, *held*, That such action, taken in connection

<sup>1</sup> "In a certain sense the commanding general is the prosecutor in nearly every case that comes before a military court within the limits of his command for in almost every case charges are submitted to his examination, approval, and, if necessary, amendment, and there is always an informal preliminary adjudication by him to determine that the case is one which is proper for trial by a court-martial before he orders the court-martial, and the accused to appear before it. It is quite apparent that in such case he is not an accuser or prosecutor in the sense of the Article of War. \* \* \* He does not alter his position as commanding officer and become accuser or prosecutor in the sense of the \* \* \* Article \* \* \* because he himself sees that the charges are in proper and definite legal form, and to that extent supervises their preparation. In the present case, the charges were not actually signed by General \* \* \*. He had no personal relation to, or knowledge of, the matter out of which the charges grew, so as to have created in him any personal feeling or interest in the conviction of the prisoner. In considering alike the question of the propriety of a court-martial and the preferment of charges, he dealt with the matter, as a commanding officer must deal in a large number of instances, upon the statements and allegations of others, and decided the matter in his own mind no further than to pronounce that upon the information before him the alleged offender should be brought before a court-martial." *Opinion of Attorney General Devens August 1, 1878, Vol. 16, p. 102.* It is also held in this opinion that where the record of the trial fails to indicate that the convening officer was the "accuser or prosecutor" of the accused, the latter, in applying to the Secretary of War to have the proceedings pronounced invalid on this ground, may establish the fact by the production of *off. facts* setting forth the circumstances of the case and the action of the commander.

with the further fact that official reports previously made by the Department Commander and the nature of the offences alleged manifestly disclosed on his part an interest and animus adverse to the accused, rendered him the accuser in the case. Card 2240, *May, 1866*.

189. The provision of this Article (and of Art. 73) that, when the convening commander is "accuser or prosecutor," the court shall be convened by the President or "next higher commander," being expressly restricted to *general* courts, has of course no application to regimental or garrison courts. The same *principle*, however, should properly be applied to proceedings before these courts, if it can be done without serious embarrassment to the service. XXXIV, 353, 598, *July and November, 1873*; XXXV, 138, *January, 1874*; XLII, 231, *April, 1879*.

190. A general court martial, convened by the division commander (a major-general), duly acting as department commander in the absence of the regular department commander, is legally convened by a general officer commanding a department in the sense of this Article. 26, 418, *September, 1888*.

191. A corps commander is held by the Secretary of War, to be a commander of an army in the field, and may convene a court-martial under the authority of this Article.<sup>1</sup> A corps commander may also convene such court where the division or separate brigade commander is the accuser or prosecutor, by authority of the act of December 24, 1861. VII, 237, *February, 1864*. But sound principles of public policy require that only the highest military authority in any army should be vested with the final power of the confirmation and execution of sentences of death and dismissal, and the act of December 24, 1861, has never been construed as conferring this power upon a corps commander when his command is not a separate and distinct army, but only, as in the case of corps of the Army of the Potomac, a constituent part of a larger body.<sup>2</sup> XI, 543, *March, 1865*; Card 4710, *July, 1898*.

#### SEVENTY THIRD ARTICLE.

In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.

192. According to the general definition given in the act of March

<sup>1</sup> This refers to the old 65th, now the 72d Article, but both contain the expression "a general officer commanding an army."

<sup>2</sup> Under date of August 5, 1898, the Secretary of War decided (circular 30, A. G. O., 1898) that "under the 167th Article of War a corps commander is held to be a commander of an army in the field when his corps is not a constituent part of a larger body and he may \* \* \* confirm sentences of dismissal of officers. A corps commander may also convene such court where the division or separate brigade commander is the accuser or prosecutor."



3, 1799 (Sec. 1114, Rev. Sts.), a division is an organized command consisting of at least two brigades, and a brigade an organized command consisting of at least two regiments of infantry or cavalry. A brigade, however, to be a "*separate brigade*" in the sense of this Article, must not exist as a component part of a division: to authorize its commander to convene a general court martial it must be detached from or disconnected with any division and be operating as a distinct command. Thus, where it appeared from the record of a trial that the court was convened by a colonel commanding the "2d Brigade, 3d Division, 14th Army Corps," *held* that it was quite clear that such colonel did not command a "*separate brigade*," and was therefore not authorized to order a general court martial. III, 546, *August, 1863*.

193. *Held*, prior to August 31, 1864 (the date of the general order specified in the following section), that where a command, not attached to a division but occupying a separate post or district, or operating separately in the field, was made up of regiments or parts of regiments sufficient to compose a brigade, and such as were commonly or might properly be organized into a brigade command, the same might in general be viewed as constituting a "*separate brigade*" in the sense of this Article, *i. e.* so far as to empower its commander to convene a general court martial. VI, 250, *August, 1864*; X, 53, 106, *July and August, 1864*; XIII, 29, *December, 1864*. But where a certain post command consisted of but one regiment of infantry with three batteries of artillery, *held* that it could scarcely be regarded as a separate brigade within the meaning of the statute. X, 106, *supra*.

194. On August 31, 1864, was issued from the War Department a general order—No. 251 of that year—which directed as follows: "Where a post or district command is composed of mixed troops, equivalent to a brigade, the commanding officer of the department or Army will designate it in orders as '*a separate brigade*,' and a copy of such order will accompany the proceedings of any general court martial convened by such brigade commander. Without such authority, commanders of posts and districts having no brigade organization will not convene general courts martial." Under this order, which was applied mainly to the commands designated in the war of the rebellion as "Districts," it was held by the Judge-Advocate General as follows:—That the fact that a district command was composed not of regiments but of detachments merely (which, however, in the number of the troops, were equal to or exceeded two regiments,) did not preclude its being designated as a "*separate brigade*," and that when so designated, its commander had the same authority to convene general courts martial as he would have if the command had the regu-

lar statutory brigade organization (XI, 110, *November, 1864*); that though a district command embraced a force considerably greater than that of a brigade as commonly constituted, yet if not designated by the proper authority as a "separate brigade," its commander would be without authority to convene general courts martial, unless indeed his command constituted a separate "army" in the sense of the 65th (now 72d) Article (XIII, 340, *February, 1865*); that it was not absolutely necessary, to give validity to the proceedings or sentence of a general court martial convened by the commander of a separate brigade, that the command should be described as a separate brigade in the caption or superscription of the order convening the court and prefixed to the record, or even that a copy of the order designating the command as a separate brigade should accompany the proceedings. As to the latter feature, the order of 1864 is viewed as directory merely. And though not to accompany the record with a copy of the order thus constituting the command would be a serious irregularity, as would be also—though a less serious one—the omission of the proper formal description of the command from the convening order, yet if the command had actually been duly designated, and *in fact* was, a separate brigade, and this fact existed of record and could be verified from the official records of the department or army, the omission of either of these particulars, though a culpable and embarrassing neglect on the part of the court or judge advocate, would not, *per se*, invalidate the proceedings or sentence. XIX, 280, *December, 1865*; 681, *September, 1866*.

195. Where the caption of the orders appointing two general courts-martial were respectively, "Headquarters 2d Detachment, Philippine Expedition, Steamer 'China' at sea," and "Headquarters Philippine Island Expeditionary Forces, 4th Expedition (2d Section), Steamer 'Rio de Janeiro' at sea", and there being nothing with the records to show that the detachment or section had been designated or was in fact a "separate brigade," *held* that the sentences were void. Cards 4847, *August, 1898*; 5086, *September, 1898*.

196. *Held*, that "a military governor of a district" has no authority as such to convene a court martial. The record of a court martial appointed by such officer under this Article should show that the court was convened and the sentence approved by him in his capacity as a division or separate brigade commander. Cards 7776, 7777, 7778, *March, 1900*.

197. *Held* (January, 1866), that until the *status belli* had been formally declared to be terminated by the President or Congress, such *status* must be held to be subsisting;<sup>1</sup> and that, till such declaration,

<sup>1</sup> As to the date (or dates) of the legal termination of the civil war, and so of the operation, for the time, of this Article, see §§ 2457, 2458, *post*.

the authority vested by the act of Dec. 24, 1861, ch. 3 (now Art. 73), in commanders of divisions and separate brigades might lawfully continue to be exercised. XXI, 136, *January, 1866*.

198. *Held*, that sect. 1114, R. S., and the Act of April 22, 1898, taken together prescribe that brigades of infantry and cavalry shall ordinarily, both in peace and war, consist of two regiments, except when in time of war or when war is imminent, it is practicable to organize them with three or more regiments each. To this extent only did the act of 1898 modify the existing laws and practice. As to the contrary ruling of the comptroller (Vol. V, 355), *remarked* that the view of the Comptroller of the Treasury as to matters of army administration are not conclusive on the War Department except so far as they are applied to matters within his jurisdiction.<sup>1</sup> As to the constitution of a brigade he may hold one way for the purpose of fixing pay and the War Department may hold differently for other purposes. Card 8196, *May, 1900*.

#### SEVENTY-FOURTH ARTICLE.

Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.

SEE JUDGE ADVOCATE.

#### SEVENTY-FIFTH ARTICLE.

General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service.

199. Under this Article all officers of the active list of the army are eligible to be detailed as members of general courts-martial. Chaplains, though eligible, are not so detailed in practice. XXXVI, 451, *May, 1875*; XLI, 306, *July, 1878*. Retired officers, in view of Sees. 1259, 1260, Rev. Sts., cannot legally be assigned to court-martial duty.

200. But only *officers* can be so detailed: courts-martial composed in whole or in part of enlisted men are unknown to our law. XLII, 311, *May, 1879*. So an "acting assistant surgeon," being a civilian, is not qualified to sit on a court martial. XXII, 542, *December, 1866*. Though any officer may legally be detailed, it is desirable that no officer should be selected who, from having preferred the charges or other known reason, may be presumed to be biased or interested in the case. XXXIX, 240, *October, 1877*.

201. Where, in the course of a trial, the number of the members of a general court martial is reduced by reason of absence, challenge, or the relieving of members, the court may legally proceed with its business so long as *five* members—the *minimum* quorum—remain: Other-

<sup>1</sup> See § 2302, *post*, and note.

wise, where the number is thus reduced below five. XVI, 549, *September, 1865*.

202. While a number of members less than five cannot be organized as a court or proceed with a trial, they may perform such acts as are preliminary to the organization and action of the court. Less than five members may adjourn from day to day, and where five are present and one of them is challenged, the remaining four may determine upon the sufficiency of the objection. V, 319, *November, 1863*.

203. A court reduced to four members and thereupon adjourning for an indefinite period, does not dissolve itself. In adjourning it should report the facts to the convening authority and wait his orders. He may at any time complete it by the addition of a new member or members, and order it to reassemble for business. V, 319, *supra*; XXXIX, 328, *November, 1877*.

204. Where a court, though reduced by the absence of members, operation of challenges, &c., to below five members, yet proceeds with and concludes the trial, its further proceedings, including its finding and sentence, (if any,) are unauthorized and inoperative. II, 450, *May, 1863*; VII, 440, *April, 1864*.

205. An assistant adjutant general, or other staff officer of a department commander, is not empowered, of his *own* authority, in the absence of the commander, to *relieve* an officer duly detailed upon a court-martial by such commander, any more than he is so empowered to *detail* a new officer as a member of such a court. XLIII, 332, *June, 1880*. See SEVENTY-SECOND ARTICLE.

206. It is for the convening authority under this Article to determine what number of officers can be convened without manifest injury to the service, and his decision in the matter is conclusive.<sup>1</sup> III, 82, *June, 1863*.

207. Where a court martial is reduced below its original number—thirteen—by a subsequent order relieving a member or members, it is not essential nor has it ever been the practice to state, in effect, in such order that no other officers than those remaining can be convened without manifest injury to the service.<sup>2</sup> XI, 108, *December, 1864*.

#### SEVENTY-SIXTH ARTICLE.

When the requisite number of officers to form a general court-martial is not present in any post or detachment, the commanding officer shall, in cases which require the

<sup>1</sup> It was thus held from an early period by the U. S. Supreme Court. See *Martin v. Mott*, 12 Wheaton, 19, 34-37 (1827); *Mullan v. U. S.*, 140 U. S., 240; *Swann v. U. S.*, 165 U. S., 553, 559.

<sup>2</sup> While the order convening a general court-martial of less than thirteen members usually contains the statement that "no other officers" or "no greater number" than those named can be assembled without manifest injury to the service, such statement is not essential to the validity of the proceedings.



cognizance of such a court, report to the commanding officer of the department, who shall thereupon order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers, and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.

#### SEVENTY-SEVENTH ARTICLE.

Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78.

**206.** Although officers and soldiers of volunteers, not being militia, are as much a part of the Army of the United States as are regular officers (see § 2444, *post*), yet, in view of the terms of this Article, an officer of the regular army, so-called, would not be eligible for detail as a member of a court martial convened for the trial of volunteer officers or soldiers, nor, when duly detailed as a member of a court-martial, would he be competent to take part in the trial of a volunteer by such court. XIX, 670, *July, 1866*.

**209.** As the act "to provide for temporarily increasing the military establishment of the United States in time of war," approved April 22, 1898, declares that the army of the United States in time of war shall consist of both the regular army and the volunteer army, *held* that such volunteer army is not with respect to the regular army "other forces" within the meaning of this Article, and that therefore officers of the regular army are competent to sit on courts-martial for the trial of officers or soldiers of such volunteer army.<sup>1</sup> Cards 4457, 4480, *June, 1898*.

#### SEVENTY-EIGHTH ARTICLE.

Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized, shall be obeyed.

#### SEVENTY-NINTH ARTICLE.

Officers shall be tried only by general courts-martial, and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.

**210.** Whether the trial of an officer by officers of an inferior rank can be avoided or not, is a question not for the accused or the court, but for the officer convening the court; and his decision (as indicated by the detail itself as made in the convening order) upon this point, *as* upon that of the number of members to be detailed, is conclusive.<sup>2</sup> III, 82, *June, 1863*; LVI, 604, *September, 1888*.

**211.** At the opening of a trial by court martial it was objected by the accused that nine of the thirteen members as detailed were his

<sup>1</sup> See this opinion published in circular 21, A. G. O., 1898.

<sup>2</sup> See § 206, *ante*, and note.

inferiors in rank, and that the detailing of such inferiors could have been "avoided" without prejudice to the service. *Held* that the objection was properly overruled by the court. Whether such a detail "can be avoided" is a question to be determined by the convening authority alone, and one upon which his determination is conclusive.<sup>1</sup> LVI, 604, *September, 1888*.

#### EIGHTIETH ARTICLE.<sup>1</sup>

In time of war a field officer may be detailed in every regiment to try soldiers thereof for offenses not capital; and no soldier, serving with his regiment, shall be tried by a regimental [or] garrison court-martial when a field officer of his regiment may be so detailed.

#### EIGHTY-FIRST ARTICLE.

Every officer commanding a regiment or corps shall, subject to the provisions of article eighty, be competent to appoint, for his own regiment or corps, court-martial, consisting of three officers, to try offenses not capital.

**212.** *Held* that the Chief of Engineers was authorized to order a court under this Article for the trial of soldiers of the engineer battalion; the same, in connection with the engineer officers of the army, being deemed, in view of secs. 1094, 1151, 1154, &c., of the Revised Statutes, to constitute a "corps" in the sense of the Article. XXII, 497, *December, 1866*. So *held* that the Chief of Ordnance was authorized to convene such a court for the trial of the enlisted men authorized by Sec. 1162, Rev. Sts., to be enlisted by him; the same being deemed to constitute, with the ordnance officers, such a separate and distinct branch of the military establishment as to come within the general designation of "corps" employed in the Article. XXXVIII, 546, *April, 1877*. So *held* that the Chief Signal Officer, under the provisions of the acts of July 24, 1876; June 20, 1878, &c., relating to his branch of the service, was authorized to order courts martial, as commanding a "corps" in the sense of this Article.<sup>2</sup> XXX, 509, *July, 1870*.

**213.** Under par. 898, Army Regulations of 1861, it devolved upon a department commander to supervise the proceedings of regimental and garrison courts martial transmitted to his headquarters, and if he discovered any material error, defect or omission in a record or in the action taken in the case by the inferior commander, to bring the same to his attention. The latter could then proceed (in case of an absolute illegality) to issue an order declaring the sentence void, or (in case of

<sup>1</sup> See authorities cited in note to § 206, *ante*; but see § 240, *post*.

<sup>2</sup> Repealed by sec. 2 of the act of June 18, 1898, establishing the summary court.

<sup>3</sup> See Manual for Courts Martial (1901), par. 2, p. 77.

a defect of a material character) to remit the punishment so far as not executed.' XXXV, 174, *February, 1874*.

### EIGHTY-SECOND ARTICLE.

Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of article eighty, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital.

214. It is not essential that the "officer commanding" should be of the rank of field officer. A commanding officer, though a captain or lieutenant, may convene a court martial under this Article, provided he has the required command. VIII, 483, *May, 1864*.

215. A commanding officer is not authorized to detail *himself*, with two other officers, as a court under this, (or the preceding,) Article. XXIV, 263, *January, 1867*. An "acting assistant surgeon," not being an officer of the army, cannot be detailed on such court. XXX, 100, *February, 1870*.

216. The general term "other place," is deemed to be intended to cover and include any situation or locality whatever post, station, camp, halting-place, &c., at which there may remain or be, however temporarily, a separate command or detachment in which different corps of the army are represented, as indicated in the next paragraph. If such command, so situated, contains enough officers, other than the commander, available for service on court martial, the commander will be competent to exercise the authority conferred by this Article. XLIV, 32, *June, 1880*.

217. *Held*, in view of the early orders<sup>1</sup> relating to the subject and of the practice thereunder, that the presence on duty with a garrison, detachment, or other separate command, at a fort, arsenal, or other post or place, and as a part of such command, of a single representative, officer or soldier, of a corps, arm, or branch of the service other than that of which the bulk of the command is composed,—as an officer of the quartermaster, subsistence, or medical department, a chaplain, an ordnance sergeant or hospital steward, an officer or soldier of artillery where the command consists of infantry or cavalry, or *vice versa*, &c.,—might be deemed sufficient to fix upon the command the character of one "where the troops consist of different corps," in the sense of this Article, and to empower the commanding officer to order a

<sup>1</sup>The paragraph of regulations cited was omitted from the regulations of 1880 and subsequent editions; but independently of any regulation on the subject department commanders, in practice, properly exercise a supervision over the records of inferior courts-martial transmitted to their headquarters, to the extent indicated in the text.

<sup>2</sup>The original order is G. O. 5, Hdqrs. of Army, 1843. And see the law as announced later in G. O. 13, Fourth Mil. Dist., 1867.

court martial under the same. VII, 174, *February, 1864*; XIV, 48, *February, 1865*; XXI, 118, *December, 1865*; XXVI, 254, *December, 1867*. The presence, however, with the command, of a *civil* employee of the army (as an "acting assistant surgeon"), could have no such effect. VIII, 483, *May, 1864*.

218. Where, after a garrison court had tried the cases referred to it but before its proceedings had been acted upon, the command of the post was devolved upon the officer who had been president of the court, *held* that such officer would legally and properly act upon the proceedings; the case not being one in which the action of the department or other higher commander was required by the 109th Article of war. XLIII, 268, *March, 1880*.

#### EIGHTY-THIRD ARTICLE.

Regimental and garrison courts-martial, and field-officers detailed to try offenders, shall not have power to try capital cases or commissioned officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.<sup>1</sup>

219. Capital offences (*i. e.*, offences capitally punishable), not being within the jurisdiction of inferior courts, such courts cannot take cognizance of acts specifically made punishable by Art. 21, however slight be the offences actually committed.<sup>2</sup> II, 189, *April, 1863*; XI, 210, *December, 1864*; XXIV, 195, *January, 1867*; XXVI, 533, *April, 1868*; XXVIII, 53, *August, 1868*; XXXII, 334, *February, 1872*.

220. A sentence forfeiting pecuniary allowances in addition to pay, where the entire forfeiture amounted to a sum greater than one month's pay, *held* not authorized under this Article. XXIX, 401, *November, 1869*.

221. A sentence, adjudged by a garrison court, of confinement, "till the expiration of the term of service" of a soldier, *held* unauthorized unless the soldier had not more than one month left to serve. XXVII, 483, *January, 1869*.

<sup>1</sup>Amended March 2, 1901, to read as follows: "Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of non-commissioned officers reduction to the ranks and in the case of first-class privates reduction to second class privates: *Provided*, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent, the trial may be had either by general, regimental, or garrison court-martial, or by said summary court, but in case of trial by said summary court without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month."

<sup>2</sup>G. O. 21, Hdqrs. of Army, 1858. And see G. O. 18, War Dept., 1859, to G. Dept. of Utah, 1858, where the proceedings of garrison courts in cases of capital offences are pronounced void.



222. The limitation of the authority of inferior courts in regard to sentences of imprisonment and fine, *held* not to preclude the imposition by them of other punishments sanctioned by the usage of the service; such, for example, as reduction to the ranks, either alone or in connection with those or one of those expressly mentioned.<sup>1</sup> XXX, 667, *October, 1870*; XLIV, 659, *January, 1882*; Card 1397, *September, 1895*.

223. The limitations imposed by the Article have reference of course to single sentences. For distinct offences made the subject of different trials resulting in separate sentences, a soldier may be placed at one and the same time under several penalties of forfeiture and imprisonment, or of either, exceeding together the limit affixed by the Article for a single sentence.<sup>2</sup> XXXI, 3, *February, 1870*.

224. While inferior courts have, equally with general courts, *jurisdiction* of all military offences not capital, committed by enlisted men, yet, in view of the limitations upon their authority to sentence, it is in general inexpedient to resort to them for the trial of the graver offences,—such as larcenies, aggravated acts of drunkenness, protracted absences without leave, &c., a proper and adequate punishment for which would be beyond the power of such tribunals. The more serious offences should, where practicable, be referred for trial to *general courts* which alone are vested with a full discretion to impose punishment in proportion to the gravity of the offence. VII, 36, 207, *January and February, 1864*; XI, 210, *December, 1864*; XVI, 315, *June, 1865*; XXVI, 487, 533, *March and April, 1868*; XLII, 33, *November, 1878*. An inferior court cannot, however, legally decline to try or sentence an offender on the ground that it is not empowered under this Article to impose a punishment adequate to his actual offence. XXVIII, 57, *August, 1868*.

#### EIGHTY-FOURTH ARTICLE.

The judge-advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: "You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubts should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases, and you do further swear that you will not divulge the sentence of the court until it shall

<sup>1</sup>See *Manual for Courts-Martial* (1901), p. 74, par. 13. The summary court act approved June 18, 1898, specifically recognizes and authorizes reduction to the ranks as a punishment by such court. See also, amended 83d Article, note 1, *ante*.

<sup>2</sup>See G. O. 18, War Department, 1859.

be published by the proper authority, except to the judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice,<sup>1</sup> in a due course of law. So help you God."

225. This Article makes the administering to the court of the form of oath thereby prescribed an essential preliminary to its entering upon a trial. Until the oath is taken as specified, the court is not qualified "to try and determine." XXXVIII, 196, *July, 1876*. The arraignment of a prisoner and reception of his plea—which is the commencement of the trial—before the court is sworn, is without legal effect. IX, 293, *June, 1864*; XI, 323, *December, 1864*. The Article requires that the oath shall be taken not by the court as a whole, but by "each member." Where, therefore, all the members are sworn at the same time, the judge advocate will preferably address each member by name, thus "you A. B., C. D., E. F., &c., do swear," &c. XIII, 483, *March, 1865*. A member added to the court, after the members originally detailed have been duly sworn, should be separately sworn by the judge advocate in the full form prescribed by the Article; otherwise he is not qualified to act as a member of the court. X, 563, *November, 1864*; XIV, 350, *April, 1865*. A member who prefers it may be affirmed instead of sworn.<sup>2</sup> II, 562, *June, 1864*.

226. The members are sworn to try and determine *the matter before them* at the time of the administering of the oath. In a case, therefore, where, after the court had been sworn and the accused had been arraigned and had pleaded, an additional charge, setting forth a new and distinct offence was introduced into the case, and the accused was tried and convicted upon the same: *held* that, as to this charge, the proceedings were fatally defective, the court not having been sworn to try and determine such charge.<sup>3</sup> XXIV, 513, *May, 1867*.

227. Where the vote of each member of the court upon one of several specifications upon which the accused was tried, was stated in the record of trial, *held* that such statement was a clear violation of the oath of the court, though it did not affect the validity of the proceedings or sentence. II, 59, *March, 1864*. A statement in the record of trial to the effect that all the members concurred in the finding or in

<sup>1</sup> The words "a court of justice" are deemed to mean a civil or criminal court of the United States, or of a State, &c., and not to include a court martial. A case can hardly be supposed in which it would become proper or desirable for a court martial to enquire into the votes or opinions given in closed court by the members of another similar tribunal. The only case which has been met with in which the members of a court martial have been required to disclose their votes by the process of a civil court, is that of *In re Mackenzie*, 1 Pa. Law J. R. 356, in which the members of a naval court martial were compelled, against their objections, to state their votes as given upon the findings at a particular trial. In the present corresponding British Article, the words "or a court martial" are added after the words "a court of justice."

<sup>2</sup> See Sec. 1, *Rev. Stat.*

<sup>3</sup> See G. C. M. O. 39, War Dept., 1867; G. O. 13, Northern Dept., 1864.

the sentence, while it does not vitiate the proceedings or sentence, is a direct violation of the oath prescribed by this Article. II, 76, *March, 1863*; VII, 3, *January, 1864*.

228. The object of the secrecy in regard to the vote of a member is to place him, when voting, beyond the reach of influences which might induce him to act contrary to his judgment on the merits of the case. 63, 263, *January, 1864*.

229. The disclosing of the finding and sentence to a clerk by permitting him to remain with the court at the final deliberation and enter the judgment in the record, is a violation of the oath and a grave irregularity, though one which does not affect the validity of the proceedings or sentence. XXVIII, 146, *October, 1868*.

#### EIGHTY-FIFTH ARTICLE.

When the oath has been administered to the members of a court-martial, the president of the court shall administer to the judges-advocate, or person officiating as such, an oath in the following form: "You, A B, do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."

#### EIGHTY-SIXTH ARTICLE.

A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings, by any riot or disorder.

230. The power of a court martial to punish, under this Article, being confined practically to acts done in its immediate presence,<sup>1</sup> such a court can have no authority to punish, as for a contempt, a neglect by an officer or soldier to attend as a witness in compliance with a summons.<sup>2</sup> V, 172, *October, 1863*.

231. A court martial has none of the common-law power to punish for contempt vested in the ordinary courts of justice, but only such authority as is given it by this Article. Thus *held* that a court-martial was not authorized to punish, as for a contempt, under this Article (or otherwise), a civilian witness duly summoned and appearing before it, but, when put on the stand, declining (without disorder) to testify.<sup>3</sup> XLII, 395, *April, 1880*; XLIX, 306, *August, 1885*.

<sup>1</sup> It was held by the Secretary of War in the case of Lt. Col. Bakenstow—G. O. 14, War Dept., 1850,—that a court martial had, under this Article, no power to punish its own members.

<sup>2</sup> As to the power of courts of inquiry to punish for contempt, see note to ONE HUNDRED AND EIGHTEENTH ARTICLE, p. 107, *post*.

<sup>3</sup> By sec. 1 of the act of March 2, 1901, "to prevent the failure of military justice," &c., provision is made for the punishment by civil authority of civilians refusing to appear or testify before general courts-martial.



**232.** The authority of the judge-advocate (under sec. 1202, Rev. Stats.) to issue "like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or district where such military courts may be ordered to sit, may lawfully issue," does not vest the court martial with power to punish a civilian witness for contempt who refuses to testify. XLIX, 306, *August, 1885*.

**233.** Where a contempt within the description of this Article has been committed, and the court deems it proper that the offender shall be punished, the proper course is to suspend the regular business, and after giving the party an opportunity to be heard, explain, &c.,<sup>1</sup> to proceed—if the explanation is insufficient—to impose a punishment; resuming thereupon the original proceedings. The action taken is properly summary, a formal trial not being culled for. Close confinement in quarters or in the guard house during the trial of the pending case, or forfeiture of a reasonable amount of pay, has been the more usual punishment.\* XXX, 361, 570, *May and August, 1870*.

#### EIGHTY-SEVENTH ARTICLE.

All members of a court-martial are to behave with decency and calmness.

#### EIGHTY-EIGHTH ARTICLE.

Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

**234.** This Article authorizes the exercise of the right of challenge before all courts except field officers' courts and summary courts.<sup>2</sup> These courts are not subject to be challenged, because, being composed of but one member, there is no authority provided which is competent to pass upon the validity of the challenge. XI, 210, *December, 1864*.

**235.** It is ordinarily a sufficient ground of challenge to a member that he is the author of the charges and is a material witness in the case. II, 584, *June, 1863*; XX, 18, *October, 1865*; XXXI, 210, *March, 1871*; XXXVII, 43, *September, 1875*; 315, *February, 1876*; XXXIX, 240, *October, 1877*. The mere fact that he is to be a witness is not in general to be held sufficient. II, 584, *supra*; XXXIII, 137, *July, 1872*.

<sup>1</sup> See G. C. M. O. 37, Fourth Mil. Dist., 1868.

<sup>2</sup> Instead of proceeding against a military person for a contempt in the mode contemplated by this Article, the alternative course may be pursued of bringing him to trial before a new court on a charge for a disorder under Art. 62. Compare Samuel, 631; Simmons, § 434. The latter course has not unfrequently been adopted in our practice.

<sup>3</sup> Manual for Courts-Martial (1901), page 27, note 3.

**236.** The mere fact that a member signed or formally preferred the charges is not sufficient ground of objection, since he may have done so ministerially or by the order of a superior. IX, 258, *June, 1864*. But where a member, upon investigation or otherwise, has initiated or preferred the charges as accuser, or as prosecutor has caused them to be brought to trial, he is properly subject to challenge. XXXIII, 204, *July, 1872*; XXXVII, 315, *February, 1875*. Thus, that a member had originated and preferred the charge for a disobedience of his own order, was held good cause of challenge. XXXVI, 257, *February, 1875*. So, in a case of a trial for an assault upon an officer, the fact that the officer upon whom the assault was committed, and who was the prosecuting witness, was a member of the court, was held to constitute complete cause of challenge to him as member. XXXIII, 257, *August, 1872*.

**237.** That a member is the regimental or company commander of the accused does not, *per se*, constitute sufficient ground of challenge. But such ground may exist where the commander has preferred the charges, or where the relations between him and the accused have been such as to give rise to a presumption of prejudice. VII, 534, *June, 1864*; XXII, 631, *March, 1867*.

**238.** Where a member, before the trial, had expressed an opinion, based upon a knowledge of the facts, that the accused would be convicted whichever way he might plead, *held* that he had clearly prejudged the case, and that the court should have sustained an objection taken to him by the accused although, upon being challenged, he declared that he was without prejudice.<sup>1</sup> XXXVII, 491, *April, 1876*.

**239.** A member, on being challenged for prejudice, declared that he did not consider the accused (an officer) a gentleman, and would not associate with him, and that he had stated so; but he added at the same time that he was not prejudiced for or against him. *Held*, especially as one of the charges was "conduct unbecoming an officer and a gentleman," that the challenge was improperly overruled by the court. XXIV, 584, *March, 1867*.

**240.** It is not good ground of challenge to a member that he is junior in rank to the accused, nor is it sufficient ground that the member will gain a step or "file" in the line of promotion if the accused is dismissed. It is however a sufficient cause of challenge to a member, that, if the accused (an officer) be convicted and sentenced to be dismissed, the member will be forthwith entitled to promotion. XXXII, 137, *July, 1872*; XXXV, 189, *December, 1875*; XXXVIII, 366, 376, *October and November, 1876*; LV, 220, *December, 1887*.

<sup>1</sup> See G. C. M. O. 66, Hdqrs. of Army, 1879.

241. *Held* sufficient ground of challenge to a member of a court martial, that he has previously taken part in an investigation of the same case before a court of inquiry, though such court did not express a formal opinion. XXIII, 406, *April, 1867*.

242. *Held* good ground of challenge to a member of a court martial, in a case of alleged theft by a soldier, that such member had been a member of a board of survey which had investigated the case and fixed the misappropriation of the property upon the accused. XXXVI, 580, *July, 1875*.

243. *Held* that the members of a court martial who had composed a previous court by which the same accused had been tried for the same act though under a different charge, were all subject to be set aside on challenge. XXVIII, 181, *October, 1868*.

244. It is not necessary (though usual and proper) for a member to withdraw from the court room on being challenged and pending the deliberation on the objection. V, 99, *October, 1863*.

245. Courts should be liberal in passing upon challenges, but should not entertain an objection which is not *specific*, or allow one upon its mere assertion by the accused without proof, and in the absence of any admission on the part of the member.<sup>1</sup> XXIV, 584, *May, 1867*; XXXVI, 578, *July, 1875*. A positive declaration by the challenged member to the effect that he has no prejudice or interest in the case, will, in general, in the absence of material evidence in support of the objection, justify the court in overruling it. XVII, 405, *September, 1865*.

246. Where, before arraignment, the accused (an officer), without having personal knowledge of the existence of a ground of challenge to a member, had credible information of its existence, *held* that he should properly have raised the objection before the members were sworn, and that the court was not in error in refusing to allow him to take it at a subsequent stage of the trial. XLI, 414, *September, 1878*.

247. The fact that a sufficient cause of challenge exists against a member but, through ignorance of his rights, is not taken advantage of by the accused, or if asserted is improperly overruled by the court, can affect in no manner the validity in law of the proceedings or sentence, though it may sometimes properly furnish occasion for a disapproval of the proceedings, &c., or a remission in whole or in part

<sup>1</sup>See G. C. M. O. 60, War Dept., 1875. The challenge, the allowance of which by the court in Gen. Twigg's case was disapproved in G. O. 4 War Dept., 1868, was simply a general objection to the member by the accused on account of "some unpleasant circumstances growing out of their official relations;" no specific allegation of bias being made, and the member himself expressly disclaiming any feeling of prejudice.

of the sentence.<sup>1</sup> VIII, 534, *June, 1864*; IX, 258, *June, 1864*; XX, 18, *October, 1865*; XXXVII, 315, 491, *February and April, 1876*; XXXIX, 240, *October, 1877*.

248. The Article imposes no limitation upon the exercise of the right of challenge other than that the challenge shall be for "cause stated," and that more than one member shall not be challenged at a time. Thus while the panel, or the court as a whole, is not subject to challenge, yet all the members may be challenged provided they are challenged separately. XXVIII, 632, *May, 1869*; XXX, 361, *May, 1870*; XXXVIII, 53, *January, 1876*. The Article contains no authority for challenging the judge advocate. XXXV, 618, *October, 1874*.

249. The Court, of itself, cannot excuse a member, in the absence of a challenge. A member, not challenged, but considering himself disqualified, can be relieved only by application to the convening authority.<sup>2</sup> XXXVII, 34, *September, 1875*.

250. An accused challenged the entire court on the ground that the convening officer was "accuser." *Held* properly overruled: the array cannot be challenged at military law. The Article declares that "the court \* \* \* shall not receive a challenge to more than one member at a time." LI, 225, *April, 1887*.

251. A court-martial cannot relieve or "excuse" a member except upon a challenge duly interposed and sustained under this Article. The fact that a member has been absent from a session of the court, and has not heard the testimony meanwhile taken, constitutes no legal ground for excusing him by the court, provided such testimony is read to him and no objection to his continuing as a member in the case is interposed by the accused.<sup>3</sup> LI, 540, *February, 1887*.

252. An accused objected to a member on the ground that some time before he had had a disagreement with the member and thought that he

<sup>1</sup>See Opinion of the Attorney General of January 19, 1878 (15 Opns. 432) in which the opinion, expressed by the Judge-Advocate General in the most recent of the cases upon which this paragraph is based—that the fact that one of the charges upon which the accused was convicted was preferred by a member of the court who also testified as a witness on the trial (but who, though clearly subject to objection, was not challenged by the accused), could not affect the validity of the sentence of dismissal after the same had been duly confirmed—is concurred in by the Attorney General. And, to a similar effect, see *Keyser v. United States*, 15 Ct. Cls., 532.

In G. C. M. O. 88, Dept. of Dakota, 1878, the point is noticed that where a challenge interposed by the accused has been improperly disallowed, a subsequent plea of guilty is not to be treated as a waiver of the advantage to which he may be entitled by reason of the improper ruling.

<sup>2</sup>S. O. 19, Dept. of Colo., 1886.

<sup>3</sup>The practice here indicated no longer obtains—see par. 4, p. 28, Manual for Courts-Martial (3901), which prescribes that "no member who has been absent during the taking of evidence shall thereafter take part in the trial," but that "this provision shall not be construed as invalidating the proceedings of courts martial when not complied with and no objection is made, but is to be regarded as a requirement which should always be complied with when practicable."



"might be prejudiced." The member declared that he was conscious of no prejudice whatever, but that, on the contrary, his feelings toward the accused were friendly. *Held* that the court erred in sustaining the challenge. LIII, 225, *April*, 1887.

253. The accused were Indian scouts charged with mutiny. Some of the members of the court, though disclaiming any prejudice against the accused personally, were aware that they were present at the outbreak, and were fully apprized, from their own personal presence or knowledge of the circumstances, that the mutiny, which had involved homicide, constituted a most aggravated offence of the class. *Held* that, as these members could scarcely avoid applying their impressions to the accused, when shown to be connected with the disorder, they would fairly have been subject to objection as triers. LV, 529, *April*, 1888.

254. A mere general opinion in regard to the impropriety of acts such as those charged against the accused, unaccompanied by any opinion as to his guilt or innocence on the charges, is not a sufficient ground of objection under this Article. 64, 174, *March*, 1894.

255. Under the custom of the service the Judge-Advocate may also challenge for cause. Card 2059, *February*, 1896.

#### EIGHTY-NINTH ARTICLE.

When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design, stands mute, or answers foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had pleaded not guilty.

#### NINETIETH ARTICLE.

The judge-advocate, or some person deputed by him, or by the general or officer commanding the Army, detachment, or garrison, shall prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate himself.

#### NINETY-FIRST ARTICLE.

The depositions of witnesses residing beyond the limits of the State, Territory, or District in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.

256. A deposition cannot be read in evidence in a capital case (that is, in a case where the offence charged is punishable capitally)—as in a case of a violation of Art. 21, or a case of a spy, or one of desertion in time of war; otherwise in a case of desertion in time of peace. III, 485, *August*, 1863; IX, 646, *September*, 1864; XXXII, 6, *June*, 1871; XLII, 177, 361, *February* and *July*, 1879. Nor is the deposition

admissible of a witness who resides in the State, &c., within which the court is held<sup>1</sup> (XLII, 361, *supra*), except by consent of the parties.<sup>2</sup> Card 1829, *November, 1895*.

257. Where the evidence of high officers or public officials--as a department commander, or chief of a bureau of the War Department--is required before a court martial, the same, especially if the court is assembled at a distant point, should be taken by deposition, if authorized under this Article. Such officers should not be required to leave their public duties to attend as witnesses, except where their depositions will not be admissible, and where the case is one of special importance and their testimony is essential. VII, 5, *January, 1864*. The Secretary of War should not be required to attend as a witness, or to give his deposition in a military case, where the chief of a staff corps or other officer, in whose bureau the evidence sought is matter of record, or who is personally acquainted with the facts desired to be proved, can attend or depose in his stead. XXXV, 505, *July, 1874*.

258. The party at whose instance a deposition has been taken, should not be permitted to introduce only such parts of the deposition as are favorable to him or as he may elect to use; he must offer the deposition in evidence as a whole or not offer it at all. XXXVI, 236, *February, 1875*.

259. If the party at whose instance a deposition has been taken decides not to put it in, it may be read in evidence by the other party. One party cannot withhold a deposition (duly taken and admissible under this Article) without the consent of the other. XXXVII, 9, *February, 1875*.

260. *Held* that the deposition of a witness residing in a foreign country, and taken before a qualified person, as an American consul, would be admissible in evidence under this Article equally with the deposition of a resident of the United States. XLII, 114, *January, 1879*.

261. Where the judge-advocate offered in evidence, on the part of the prosecution, a deposition which proved to have been given by a person other than the one to whom the interrogatories were addressed, and the accused objected to its introduction, but the objection was overruled by the court, *held* error: the fact that the intended deponent was but the agent, in the transaction inquired about, of the person who actually furnished the deposition, not being sufficient to make such deposition admissible except by consent of parties.<sup>3</sup> XLII, 140, *January, 1879*.

<sup>1</sup>Note the remarks of the reviewing authority in G. C. M. O. 102, Dept. of the East, 1871; do. 1, Division of South, 1875.

<sup>2</sup>See Manual for Courts-Martial (1901), note 1, p. 161.

<sup>3</sup>See G. C. M. O. 9, Hdqrs. of Army, 1879.



262. This Article, in any case within its terms and in which its conditions are complied with, entitles either party to have depositions taken and "read in evidence." The court alone has no power to decide that a deposition, where legal and material, shall not be taken.<sup>1</sup> 48, 59, *June, 1891*; Card 6739, *July, 1899*.

263. A deposition, introduced by either party, which is not "duly authenticated," should not be admitted in evidence by the court, although the other party may not object. 34, 75, *July, 1889*. A deposition *held* irregular and inadmissible where it failed to show that the officer by whom it was taken was authorized to take it, or that he was qualified to administer the oath to the witness. 14, 285, *January, 1887*.

264. The Article, in specifying that the deposition, to be admissible in evidence, shall be "duly authenticated," makes it essential that the same shall be sworn to before, *i. e.* taken under an oath administered by, an official competent to administer oaths for such purpose. A deposition should now be sworn to before one of the military officers specified in the act of July 27, 1892, s. 4, or, if such an officer be not accessible, by a civil official competent to administer oaths in general. An official, empowered to administer oaths only for a certain special purpose or purposes, can not legally qualify a witness whose deposition is sought to be taken under this Article. 34, 75, *July, 1889*; 57, 61, *December, 1892*.

265. A court-martial has no power to qualify or authorize a commanding officer, or any other officer or person, to take a deposition or administer an oath. LV, 486, *March, 1888*.

266. A deposition is not in general satisfactory evidence for purposes of personal identification by description, and should not be resorted to for the identification of an accused where reliable oral testimony can be obtained. 60, 330, *July, 1893*.

267. The depositions of civilian witnesses, while their taking generally involves less expense than would the personal attendance of the parties, are usually quite sufficient as testimony, except when the purpose of the evidence is to personally identify the accused before the court. 64, 466, *May, 1894*.

268. Where a deposition, introduced by the prosecution, though legal, was incomplete, but the defect was waived by the accused, *held* that the prosecution was estopped from afterwards questioning it as competent evidence. LL, 560, *February, 1887*.

269. The officer detailed to have a deposition taken, *i. e.*, to see to

<sup>1</sup> Where, however, the matter has been submitted to the court, it might in a proper case decide that oral testimony alone would answer.

its being taken, should, before serving the subpoena, complete it, if necessary, by inserting the name and official designation of the notary (or other official having authority to administer the oath), before whom it is to be taken, and the date on which and the place where it is proposed to take it. And when the deposition has been duly taken, he should certify it as so taken, and transmit it in a sealed package to the president of the court. 65, 57, *May, 1894*.

270. Civilian witnesses who duly give their depositions under this Article are entitled to the same fees and allowances as are witnesses who duly attend the court in person.<sup>1</sup> The voucher, to enable such a witness to obtain his dues, should simply set forth the facts as to his service, substituting, for the usual statement in regard to attendance before the court, a statement that he duly attended as a witness at a certain time and place, and duly gave his deposition before a certain official named. 64, 336, *April, 1894*.

271. *Held* that a sum of three dollars, disbursed by an officer ordered to procure a deposition to be taken, as a payment to a justice of the peace before whom the deposition was given, would legally be reimbursed, on the presentation of a proper voucher, by the quartermaster department, out of the appropriation for the expenses of witnesses before courts-martial. 64, 60, *February, 1894*.

272. A deposition duly taken, under the Article, on the part of the prosecution, is not subject to objection by the accused, and cannot be rejected by the court, merely upon the ground that it is declared in the VIth Amendment to the Constitution that "in all criminal prosecutions the accused shall enjoy the right \* \* \* to be confronted with the witnesses against him." This constitutional provision has no application to courts martial: the "criminal prosecutions" referred to are prosecutions in the U. S. civil courts. LII, 148, *March, 1887*; LV, 486-493, *March, 1888*; 44, 351, *December, 1890*; 52, 204, *February, 1892*; 55, 493, *October, 1892*.

273. The provisions of Secs. 866-870, Rev. Sts., relate to depositions in the U. S. courts and have no application to courts martial which are no part of the U. S. judiciary. *Held* therefore that there was no authority whatever for prescribing, as was done in G. O. 2, Dept. of Texas, 1888, that the laws of Texas in regard to the taking of depositions should govern depositions in military courts held within that State. LV, 486, 586, *March and May, 1888*.

#### NINETY-SECOND ARTICLE.

All persons who give evidence before a court-martial shall be examined on oath, or affirmation, in the following form: "You swear (or affirm) that the evidence you

<sup>1</sup>See Circ. 9, A. G. O., 1883.

shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth—So help you God.”<sup>1</sup>

274. This Article does not prescribe by whom the oath shall be administered. By the custom of the service it is administered by the judge-advocate.<sup>2</sup> When the judge advocate himself takes the witness stand, he is properly sworn by the president of the court. XLII. 269, *May, 1879.*

### NINETY-THIRD ARTICLE.

A court-martial shall, for reasonable cause grant a continuance to either party, for such time, and as often, as may appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

275. The court should in all cases require that the desired evidence appear or be shown to be material, and not merely cumulative,<sup>3</sup> and that to await its production will not delay the trial for an unreasonable period. It should also, in general, before granting the continuance, be assured that the absence of the witness is not owing to any neglect on the part of the applicant.<sup>4</sup> This feature, however, will not be so much insisted upon in military as in civil cases.<sup>5</sup> VIII. 662, *July, 1864.*

276. Where “reasonable cause” is, in the judgment of the court, exhibited, the party is entitled to *some* continuance under the Article. A refusal, indeed, by the court to grant such continuance will not invalidate the proceedings, but, if the accused has thus been prejudiced in his defence, may properly constitute good ground for disapproving

<sup>1</sup> That a witness testified without being sworn is not ground for new trial, when no objection was made at the trial and witness was cross-examined, see *Moore v. State*, 33 S. W. Rept., 1046.

<sup>2</sup> See now sec. 4, act of July 27, 1892, which confers power to administer such oaths upon the judge-advocate.

This Article prescribes a single specific form of oath to be taken by *all* witnesses. The Constitution, however, Art. I of Amendments, has provided that Congress shall make no law prohibiting the free exercise of religion. Where, therefore, the prescribed form is not in accordance with the religious tenets of a witness, he should be permitted to be sworn according to the ceremonies of his own faith or as he may deem binding on his conscience. See 1 Greenl. Ev., § 371, O'Brien, 260.

A witness who has once been sworn and has testified, is not required to be re-sworn on being subsequently recalled to the stand by either party. In practice he is usually reminded that he is still under oath. The re-swearing, however, of such a witness will not affect the validity of the proceedings or sentence.

<sup>3</sup> Compare *People v. Thompson*, 4 Cal., 279; *Parker v. State*, 55 Mass., 414.

<sup>4</sup> See par. 2, “Postponement,” page 30, Manual for Courts-Martial. It is not, however, the practice of courts-martial to admit counter affidavits from the opposite party as to what the absent witness would testify. As to the civil practice, see *Williams v. State*, 6 Nebraska, 334.

<sup>5</sup> A military accused can not be charged with laches in not procuring the attendance of a witness who is prevented from being present by superior military authority. Thus in a case in 15 O. 63, Dept. of Dakota, 1872, an accused soldier was held entitled to a continuance till the return of material witnesses then absent on an Indian expedition.

the sentence,<sup>1</sup> or for mitigating or partially remitting the punishment. XXII, 502, *December 1866*; XXXIII, 616, *December, 1872*; XXXIX, 13, *May, 1876*.

277. Where an accused soldier, by reason of his regiment having been moved a long distance since his arrest, was separated at his trial, from certain witnesses material to his defence, *held*, that he was entitled to a reasonable continuance for the purpose of procuring their attendance or their depositions. XXIV, 559, *May, 1867*.

278. That the charges and specifications upon which an accused is arraigned differ in a material particular from those contained in the copy served upon him before arraignment, may well constitute a sufficient ground for granting him additional time for the preparation of his defence. XXIV, 514, *May, 1867*.

279. Where after arraignment a material and substantial amendment is allowed by the court to be made by the judge advocate in a specification, the effect of which amendment is to necessitate or make desirable a further preparation for his defence on the part of the accused, a reasonable postponement for this purpose will in general properly be granted by the court. XXII, 58, *April, 1866*.

280. It is in general good ground for a reasonable continuance, that the accused needs time to procure the assistance of counsel,<sup>2</sup> if it is made to appear that such counsel can probably be obtained within the time asked, and that the accused is not chargeable with remissness in not having already provided himself with counsel. XIII, 400, *February, 1865*.

#### NINETY-FOURTH ARTICLE.<sup>3</sup>

Proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example.

281. This Article is imperative upon the point that no proceedings of trials shall be carried on before eight o'clock a. m. or after three o'clock p. m., except in the class of cases specifically indicated. Where, therefore, the record shows affirmatively that any particular material proceeding of the trial was had by the court before eight or after three o'clock, and sets forth no authority for the same from the convening officer (such as the usual direction or permission in the convening order, that the court "will," or "may, sit without regard to hours"),

<sup>1</sup> See G. C. M. O. 35, War Dept., 1867; do. 128, Hdqrs. of Army, 1876; G. O. 24, Dept. of Arizona, 1874.

<sup>2</sup> G. C. M. O. 25, War Dept., 1875.

<sup>3</sup> Note the different reasons for this enactment assigned by Attorney General Speed (11 Opins. 137, 141), and Cooley (p. 50). And see, on this point, Hough, *Practice*, 377. This Article was repealed by act of March 2, 1901 (G. O. 27, A. G. O., 1901).



such proceeding must be held unauthorized and of no legal effect.<sup>1</sup> And if the proceeding, thus futile, was one necessary to the completeness of the trial, or otherwise important, it should be *repeated*, or taken *de novo*, within legal hours. II, 123, *March, 1863*; VII, 433, *April, 1864*; XXIII, 627, *August, 1867*; XXXVI, 406, *May, 1875*. 44, 143, *December, 1890*.

282. The Article, however, does not require that the record shall show in terms that the hours indicated were observed. It is proper, indeed, and the best practice, to state the hour of each meeting and adjournment; but where no such entry appears in the proceedings, the same will not be invalidated, but, in the absence of evidence to the contrary, it will be *presumed*, in favor of the record,<sup>2</sup> that the court did not sit except between the prescribed hours. XXII, 635, *March, 1867*; XXIII, 627, *August, 1867*; XXX, 144, *March, 1870*.

283. The entertaining by the court, after three o'clock p. m., of a motion to adjourn would not be unauthorized, such a motion not being properly a *proceeding of a trial* in the sense of the Article. XXVIII, 189, *October, 1868*.

284. Where neither in the order convening a court-martial, nor in any supplementary order, is authority given for its sitting beyond or outside of the hours prescribed by this Article, and its record affirmatively shows that the trial or a portion of the trial of a case was not conducted within such hours, the proceedings had outside the prescribed hours, are unauthorized and inoperative, and the sentence, if any, is nullified, *unless* by a reconvening of the court the defect may be remedied. 44, 77, *November, 1890*. Thus, where it appeared from the record that a court-martial, on a certain day, without any authority given it, completed a trial after 3 o'clock p. m., *advised* that the error might be corrected by continuing the trial anew, within legal hours, from the point reached at three o'clock on that day; and *recommended* that the court be reconvened for this purpose. 44, 143, *December, 1890*.

#### NINETY-FIFTH ARTICLE.

Members of a court-martial, in giving their votes, shall begin with the youngest in commission.

<sup>1</sup> In some cases where the trials have, without express authority, been commenced before 8 a. m., or continued after 3 p. m., the entire proceedings and sentences have been disapproved as fatally defective. See G. O. 2, Dept. of the South, 1873, do. 94, Dept. of the Gulf, 1864; S. O. 281, Dept. of Washington, 1861. Strictly, however, it is only the proceeding had during the inhibited interval that is unauthorized and inoperative, and the irregularity involved may in general be remedied as indicated in the text. And see § 284, *post*. But see preceding note.

<sup>2</sup> As to the presumption in favor of the regularity of judicial proceedings, see 1 Greenl. Ev., § 19; also § 2138, *post*, and note.

## NINETY-SIXTH ARTICLE.

No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned.

**285.** A sentence of death imposed by a court martial, upon a conviction of several distinct offences, will be authorized and legal if any *one* of such offences is made capitally punishable by the Articles of War, although the other offences may not be so punishable. III, 253, 276, 480, *July and August, 1863.*

**286.** A court martial, in imposing a death sentence, should not designate a time or place for its execution, such a designation not being within its province but pertaining to that of the reviewing authority. If it does so designate, this part of the sentence may be disregarded, and a different time or place fixed by the commanding general. III, 650, *September, 1863.*

**287.** Where a death sentence imposed by a court-martial has been directed by the proper authority to be executed on a particular day, and this day, owing to some exigency of the service, has gone by without the sentence being executed, it is competent for the same authority, or his proper superior, to name another day for the purpose, the time of its execution being an immaterial element of this punishment.<sup>1</sup> III, 650, *September, 1863; V, 22, September, 1863.*

## NINETY-SEVENTH ARTICLE.

No person in the military service shall, under the sentence of a court martial, be punished by confinement in a penitentiary, unless the offence of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District, in which such offence may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.

**288.** This Article, by necessary implication, prohibits the imposition of confinement in a penitentiary as a punishment for offences of a purely or exclusively military character—such as desertion for exam-

<sup>1</sup> It was held by the Supreme Court in *Coleman v. Tennessee* (7 Otto, 509, 519-520), that a soldier who had been convicted of murder and sentenced to death by a general court martial in May, 1865, but the execution of whose sentence had been meanwhile deferred, by reason of his escape and the pendency of civil proceedings in his case, might at the date of the ruling (October Term, 1878) be delivered up to the military authorities of the United States, to be dealt with as required by law.

More recently (May, 1879, 16 Opins., 342), it has been held in this case by the Attorney General that the death sentence might legally be executed notwithstanding the fact that the soldier had meanwhile been discharged from the service, such discharge, while formally separating the party from the army, being viewed as not affecting his legal status as a military convict. But, in view of all the circumstances of the case, it was recommended that the sentence be commuted to imprisonment for life or a term of years.



ple.<sup>1</sup> V, 500, *December, 1863*; VII, 538, *April, 1864*; XXIII, 415, *April, 1867*; XXVIII, 126, *September, 1868*; XXIX, 250, *September, 1869*; XXXI, 296, *April, 1871*; XXXII, 255, *January, 1872*; XXXIII, 175, *July, 1872*.

289. A sentence of penitentiary confinement in a case of a purely military offence is wholly unauthorized and should be disapproved. Effect cannot be given to such a sentence by *commuting* it to confinement in a military prison, or to some other punishment which would be legal for such offence.<sup>2</sup> XXIV, 202, *January, 1867*; XXVII, 290, *October, 1868*; XXX, 603, *August, 1870*; Card 439, *October, 1894*. Nor, in a case of such an offence, can a severer penalty—as death—be commuted to confinement in a penitentiary. XI, 413, *February, 1865*.

290. Nor can penitentiary confinement be legalized as a punishment for purely military offences by *designating* a penitentiary as a "military prison," and ordering the confinement there of soldiers sentenced to imprisonment on conviction of such offences. XXXV, 377, *May, 1874*; XXXIX, 659, *September, 1878*.

291. An offence duly charged as "Conduct to the prejudice of good order and military discipline," or as a violation of the 60th Article of War, which, however, is *in fact* a larceny,<sup>3</sup> embezzlement, violent crime, or other offence made punishable with penitentiary confinement by the law of the State, &c., may legally be visited with this punishment. IX, 281, *January, 1864*; 28, 302, *November, 1888*.

292. The term "penitentiary," as employed in this Article, has reference to civil prisons only—as the penitentiary of the United States or District of Columbia at Washington, the public prisons or penitentiaries of the different States, and the penitentiaries "erected by the United States" (see Sec. 1892, Rev. Sts.) in most of the Territories.<sup>4</sup> The term *State* or *State's prison* in a sentence is equivalent to *penitentiary*. IX, 70, *May, 1864*.

293. A military prisoner duly sentenced or committed to a penitentiary, becomes subject to the government and rules of the institution. XXIX, 296, *September, 1869*.

294. A court martial, in imposing by its sentence the punishment of confinement in a penitentiary, is not required to follow the statute of the United States or of the State, &c., as to the *term* of the confine-

<sup>1</sup>See G. O. 1, War Dept., 1867; also the action taken in cases in the following General Orders: G. O. 21, Dept. of the Platte, 1866, do. 21, Id., 1871, do. 44, Eighth Army Corps, 1862; G. C. M. O. 34, 35, 43, 46, 72, 73, Dept. of the Missouri, 1870.

<sup>2</sup>But see Par. 940, A. R., as amended by G. O. 3, A. G. O., 1901 (1041 of 1901).

<sup>3</sup>In a case of *larceny*, the court should inform itself as to whether the *value* of the property stolen be not too small to permit of penitentiary confinement for the offence under the local law. See G. O. 44, Eighth Army Corps, 1862, G. C. M. O. 63, Dept. of the Platte, 1872.

<sup>4</sup>See pars. 940 and 941, A. R. (1041 and 1042 of 1901).

ment. It may adjudge, at its discretion, except as provided in the 58th Article of War, a less or a greater term than that affixed by such statute to the particular offence. At the same time the court will often do well to consult the statute, as indicating a reasonable measure of punishment for the offence. XXVIII, 247, *November, 1868*.

**295.** Where a court martial specifically sentences an accused to confinement in a "military prison," he cannot legally be committed to a penitentiary, although such form of imprisonment would be authorized by the character of his offence. XXIX, 250, *September, 1869*. But where a sentence of confinement is expressed in general terms, as where it directs that the accused shall be confined "in such place or prison as the proper authority may order," or in terms to such effect, *held* that the same may, under this Article, legally be executed by the commitment of the party to a penitentiary, to be designated by the reviewing officer or Secretary of War, provided of course the offence is of such a nature as to warrant this form of punishment. XLI, 664, *August, 1879*; XLII, 218, *March, 1879*.

**296.** *Held* that penitentiary confinement could not legally be adjudged upon a conviction of a violation of the 21st Article, alleged in the specification to have consisted in the lifting up of a weapon (a pistol) against a commanding officer and discharging it at him with intent to kill. By charging the offence under this Article, the Government elected to treat it as a purely military offence subject only to a military punishment. 35, 141, *September, 1889*; 64, 385, *April, 1894*. So, upon a conviction of joining in a mutiny, in violation of Art. 22, *held* that a sentence of confinement in a penitentiary would not be legal although the mutiny involved a homicide, set forth in the specification as an incidental aggravating circumstance. 26, 284, *September, 1888*. To have warranted such a punishment in either of these cases the Government should have treated the act as a "crime," and charged and brought it to trial, as such, under Art. 62.

**297.** Where the act is charged as a crime under Art. 62, and charge and specification taken together show an offence punishable with confinement in a penitentiary by the law of the *locus* of the crime, the sentence may legally adjudge such a punishment. So *held* in a case where charge and specification together made out an allegation of perjury under Sec. 5392, Rev. Sts. 26, 497, *September, 1888*.

**298.** "Obtaining money under false pretenses" is punishable by confinement in a penitentiary by the laws of Arizona. A sentence of court-martial, imposing this punishment, on conviction of an offence of this description committed in this Territory, charged as a crime under Art. 62, *held* authorized by Art. 97. 31, 117, *March, 1889*.

**299.** A punishment of confinement in a penitentiary, where legal, may

be mitigated to confinement in a military prison or at a military post. 29, 209, *January, 1889.*

300. A discharged soldier, serving a sentence of confinement in a State or Territorial penitentiary, still remains under military control, at least so far that his sentence may, by competent military authority, or by the President, be remitted, or may be mitigated—as for example to confinement in a military prison or at a military post. 17, 216, *January, 1887*; 29, 209, *January, 1889*; 63, 370, *February, 1894.*

#### NINETY-EIGHTH ARTICLE.

No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.

#### NINETY-NINTH ARTICLE.

No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court martial, or in mitigation thereof.

#### ONE HUNDREDTH ARTICLE.

When an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came, or where he usually resides, and after such publication it shall be scandalous for an officer to associate with him.

301. The terms "*cowardice*" and "*fraud*," employed in this Article, may be considered as referring mainly to the offences made punishable by Articles 42 and 60. With these, however, may be regarded as included all offences in which fraud or cowardice is *necessarily involved*, though the same be not expressed in terms in the charge or specification. XI, 671, *April, 1865.*

302. Though the injunction of the Article, as to the *direction* to be added in the sentence, should of course regularly be complied with, a failure so to comply will not affect the validity of the punishment of dismissal adjudged by the sentence.<sup>1</sup> XXII, 508, *December, 1866*; XXVII, 652, *May, 1869.*

#### ONE HUNDRED AND FIRST ARTICLE.

When a court martial suspends an officer from command, it may also suspend his pay and emoluments for the same time, according to the nature of his offence.

#### SEE SUSPENSION

<sup>1</sup> Note the action taken in the case published in G. C. M. O. 27, War Dept., 1872. The declaration of the Article, that after the publication, "it shall be scandalous for an officer to associate with" the dismissed officer, though it has, as in cases published in G. O. (A & I G. O.) of May 13, 1820, and G. O. 168, Dept. of the Missouri, 1865, been incorporated in the sentence, is not intended to be, and should not be so incorporated.

## ONE HUNDRED AND SECOND ARTICLE.

No person shall be tried a second time for the same offence.

**303.** The Constitution (Art. V of the Amendments) declares that "no person shall be subjected, for the same offence, to be twice put in jeopardy of life or limb." The U. S. courts, in treating the term "put in jeopardy" as meaning practically *tried*, hold that the "jeopardy" indicated "can be interpreted to mean nothing short of the acquittal or conviction of the prisoner and the judgment of the court thereon."<sup>1</sup> So, *held* that the term "tried," employed in this Article, meant *duly proceeded, before a court-martial, to a final conviction or acquittal*; and, therefore, that an officer or soldier, after having been duly convicted or acquitted by such a court, could not be subjected to a second military trial for the same offence, except by and upon his own waiver and consent. That the accused may *waive* objection to a second trial was held by Attorney General Writ in 1818,<sup>2</sup> and has since been regarded as settled law. V, 172, *October, 1863*; Card 5766, *January, 1899*; VI, 62, and VIII, 37, *March, 1864*.

**304.** Where an officer or soldier has been duly acquitted or convicted of a specific offence, he cannot, against his consent, be brought to trial for a minor offence included therein, and an acquittal or conviction of which was necessarily involved in the finding upon the original charge. Thus a party convicted or acquitted of a desertion cannot afterwards be brought to trial for an absence without leave committed in and by the same act. See §§ 1093 and 1359, *post*.

**305.** *Held* that there was no "second" trial, in the sense of the Article, in the following cases, *viz*: Where the party, after being arraigned or tried before a court which was illegally constituted or composed, or was without jurisdiction, was again brought to trial before a competent tribunal. IX, 261, *June, 1864*; XVIII, 214, *September, 1865*; XXVIII, 68, *August, 1868*; Cards 1645, *September, 1895*; 4086, *April, 1898*. Where the accused, having been arraigned upon and having pleaded to certain charges, was rearraigned upon a new set of charges substituted for the others which were withdrawn. XIX, 212, *October, 1865*. Where one of several distinct charges upon which the accused had been arraigned was withdrawn pending the trial, and the accused, after a trial and finding by the court upon the other charges, was brought to trial anew upon the charge thus withdrawn. V, 213, *October, 1863*. Where, after proceedings commenced but discontinued without a finding, the accused was brought to trial anew upon the same charge. V, 192, *October, 1863*. Where, after having been

<sup>1</sup> *United States v. Haskell*, 4 Wash. C. C., 402, 409. And see *United States v. Shoemaker*, 2 McLean, 114; *United States v. Gilbert*, 2 Sumner, 19; *United States v. Perez*, 9 Wheaton, 579; 1 Opins. At. Gen., 294.

<sup>2</sup> 1 Opins. At. Gen., 233. And see also *id.*, 200, 205.



acquitted or convicted upon a certain charge which did not in fact state the real offence committed, the accused was brought to trial for the same act but upon a charge setting forth the true offence. XXV, 675, *June, 1868*; XXVII, 604, *April, 1869*. Where the accused was brought to trial after having had his case fully investigated by a different court which however failed to agree in a finding and was consequently dissolved.<sup>1</sup> XXV, 73, *September, 1867*. Where the first court was dissolved because reduced below five members by the casualties of the service pending the trial. VI, 62, *March, 1864*. Where, for *any* cause, without fault of the prosecution, there was a "mistrial," or the trial first entered upon was terminated, or the court dissolved, at any stage of the proceedings before a final acquittal or conviction. V, 132, *October, 1863*; 32, 29, *April, 1889*.

306. Where an officer or soldier, having been acquitted or convicted of a criminal offence by a *civil* court, is brought to trial by a court-martial for a military offence involved in his criminal act, he can not plead "a former trial," in the sense of this Article. So where the trial for the military offence has preceded, he can not plead *autrefois acquit* or *convict* to an indictment for the civil crime committed in and by the same act.<sup>2</sup> V, 140, *October, 1863*.

307. Where the accused has been once duly convicted or acquitted, he has been "tried" in the sense of the Article, and can not be tried again, against his will, though no action whatever be taken upon the proceedings by the reviewing authority (XXXI, 300, *April, 1871*); or, though the proceedings, findings (and sentence, if any) be wholly disapproved by him.<sup>3</sup> IX, 611, *September, 1864*; XXVII, 348, *November, 1868*; 605, *April, 1869*; XXXVIII, 38, *April, 1876*; 60, 177, *June, 1893*. It is immaterial whether the former conviction or acquittal was approved or disapproved. 36, 259, *November, 1889*.

308. That an accused has been, in the opinion of the reviewing authority, inadequately sentenced, either by a general or an inferior court, cannot except his case from the application of this Article; though insufficiently punished, he cannot be tried again for the same offence. VII, 17, *January, 1864*; XXVIII, 60, *August, 1868*.

309. Where an officer, who had killed a superior officer in an altercation at a military post, was brought to trial before a civil court on a charge of murder and acquitted, and was subsequently arraigned before a court martial for an offence against military discipline involved in his criminal act, *held* that a plea of former trial interposed by him was properly overruled by the court. 65, 268, 269, *June, 1894*.

<sup>1</sup>See *United States v. Perez*, 9 Wheat., 579.

<sup>2</sup>See 6 Opins. At. Gen., 413, 506.

<sup>3</sup>Compare *Macomb*, § 159, *O'Brien*, 277; *Rules for Bombay Army*, 45; *McNaughton*, 132-133.

**310.** A soldier was convicted of "manslaughter," but the findings and sentence were disapproved. He was then brought to trial on a charge of mutiny, as committed on the occasion of the homicide, the latter being alluded to in the specification as an incidental circumstance of aggravation, and was found guilty and sentenced. *Held* that the accused was not, in the sense of this Article, "tried a second time for the same offence," the mutiny not consisting in the act of homicide but constituting a distinct offence. 26, 284, *September, 1888.*

**311.** There cannot, in view of this Article, be a second trial where the offence is really the same though it may be charged under a different description and under a different article of war. Thus, where the Government elects to try a soldier under the 32d Article for "absence without leave," or under the 42d for "lying out of quarters," and the testimony introduced develops the fact that the offence was desertion, the accused, after an acquittal or conviction, cannot legally be brought a second time to trial for the same absence charged as a desertion. 34, 401, *August, 1889.*

**312.** It is not misrepresentation or concealment by an applicant for enlistment, but the procuring of his enlistment by means of misrepresentation or concealment, together with the receipt of pay or allowance, which constitutes the military offence of fraudulent enlistment under the act of Congress approved July 27, 1892. *Ibid.*, therefore, where a soldier was tried for and convicted of fraudulent enlistment in procuring his enlistment by means of a misrepresentation or concealment, that to again try him for the same enlistment on account of another misrepresentation or concealment subsequently discovered would be a second trial for the same offence within the meaning of this Article. Card 2768, *January, 1897.*

**313.** The reconsideration by a court martial of a finding, whether of guilty or not guilty, when duly reconvened for that purpose, is not a second trial within the meaning of this Article. The original and revised proceedings are merely parts of one and the same trial.<sup>1</sup> Card 5654, *July, 1899.*

### ONE HUNDRED AND THIRD ARTICLE.

No person shall be liable to be tried and punished by a general court-martial for any offence which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period. No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offence, unless he shall

<sup>1</sup>See 6 Opins. At. Gen., 200, 204, 7 *id.*, 338, 18 *id.*, 113; *Swain v. U. S.*, 165, F. 8., 553.



meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was mustered into the service.

314. The "order for such trial," within the meaning of this Article, is the reference of the charges to the court for trial, and not the order appointing the court. Card 1646, *August, 1895*.

315. The mere fact that the offence was concealed by the accused and remained unknown to the military authorities for more than two years, constitutes no "impediment" in the sense of the Article.<sup>1</sup> XXI, 635, *September, 1866*; L, 633, *August, 1886*.

316. A mere allegation in a specification, to the effect that the whereabouts of the offender was unknown to the military authorities during the interval of more than two years which had elapsed since the offence, is not a good averment of a "manifest impediment" in the sense of the Article. XXXV, 640, *October, 1874*.

317. The liability to trial after discharge, imposed by the last clause of Art. 60, *held* subject to the limitation prescribed in Art. 103.<sup>2</sup> XII, 481, 536, *July and August, 1865*; XV, 133, *April, 1867*; XXI, 4, *November, 1865*; XXVI, 670, *July, 1868*. And so held as to the liability to trial after the expiration of the term of enlistment, under Art. 48.<sup>3</sup> XXXI, 384, *May, 1871*.

318. The prohibition of the Article relates only to prosecutions before general courts martial; it does not apply to trials by inferior courts. So, courts of inquiry may be convened without regard to the period which has elapsed since the date or dates of the act or acts to be investigated.<sup>4</sup> XLII, 213, *March, 1879*. Nor does the rule of limitation apply to the hearing of complaints by regimental courts under Art. 30. XXXI, 452, *June, 1871*.

319. In view of this Article it is the duty of the Government to prosecute an offender within a reasonable time after the commission of the offence. 21, 156, *December, 1887*.

320. The limitation is properly a matter of *defense* to be specially pleaded and proved.<sup>5</sup> 21, 156, *December, 1887*; 40, 476, *May, 1890*; 59, 278, *May, 1893*; 85, 346, *June, 1894*. By a plea of guilty the accused is assumed to waive the right to plead the limitation by a special plea in bar. LV1, 75, *April, 1888*. But under a plea of not

<sup>1</sup> 14 Opins. At. Gen., 52, 206-208.

<sup>2</sup> 14 Opins. At. Gen., 52.

<sup>3</sup> See, to a similar effect, 13 Opins. At. Gen., 462, 15 *id.*, 152; 16 *id.*, 170; also, *In re Bird*, 2 Sawyer, 33.

<sup>4</sup> See 6 Opins. At. Gen., 239.

<sup>5</sup> *In re Bogart*, 2 Sawyer, 396, 397; *In re White*, 17 Fed. Rep., 723; *In re Davison*, 21 Fed. Rep., 618; *In re Zimmerman*, 30 Fed. Rep., 176; G. O. 22 of 1893. And compare U. S. v. Cooke, 17 Wallace, 198.

guilty the limitation may be taken advantage of by *evidence* showing that it has taken effect. 21, 156, *supra*; 55, 266, *September, 1892*.

321. By the absence referred to in the original Article, in the term - "unless by reason of having absented himself" - is believed to be intended, not necessarily an absence from the United States, but an absence by reason of a "fleeing from justice," analogous to that specified in Sec. 1045, Rev. Sts., which has been held to mean leaving one's home, residence or known abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for the offence against the United States.<sup>1</sup> Thus *held* that, in a case other than desertion, it was not essential for the prosecution to be prepared to prove that the accused had been beyond the territorial jurisdiction of the United States in order to save the case from the operation of the limitation. 58, 268, *March, 1893*; 64, 48, *February, 1894*.

322. A court martial, in a case of an offence other than desertion, sustained a plea of the statute of limitations in bar of trial for the reason that the judge-advocate could produce no evidence to show that the accused was not within the territorial jurisdiction of the United States during his absence. *Held* that such showing was not necessary, and that it was sufficient that the absence should be any unauthorized absence from the military service whereby the absentee evades and for the time escapes trial. This construction of the term "absented himself" in the Article corresponds to that placed on the words "fleeing from justice," as used in the statutes of the U. S. to designate those whom the statutes of limitation for the prosecution of crimes do not protect.<sup>2</sup> 64, 137, 151, *March, 1894*.

#### ONE HUNDRED AND FOURTH ARTICLE.

No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.

323. This Article is properly to be complied with by an approval of the sentence (where the same is approved in fact) by "the officer ordering the court," &c., although - as in a case of a sentence of dismissal in time of peace - he may not be empowered *finally* to confirm and give effect to the sentence. His approval is required as showing that he does not, as he is authorized to do, *disapprove*. IX, 15, *May, 1864*.

324. The approval of the sentence indicated by this Article should

<sup>1</sup> U. S. v. O'Brien, 3 Dillon, 381; U. S. v. White, 5 Cranch C. C., 38, 73, Gould & Tucker, Notes on Rev. Sts., 349.

<sup>2</sup> See G. C. M. O. 19, A. G. O., 1894.

properly be of a *formal* character. An endorsement, signed by the commander, of the single word "approved,"—a form not unfrequently employed during the civil war—though, strictly, sufficient in law (XXVI, 511, *April, 1868*), is irregular and objectionable. So, *held* that a mere statement, written in or upon the proceedings, in transmitting them to the President, that the record was "forwarded" for the action of superior authority, was insufficient as not implying the requisite approval according to the Article. II, 99, *March, 1863*; VII, 476, *April, 1864*. And similarly *held* of a mere recommendation that the proceedings be approved by such authority. IX, 50, 54, *May, 1864*. Card 2844, *January, 1897*. The article requires the sentence to be "approved." *Held*, therefore, where a sentence had been duly adjudged, that a formal approval of the "findings" *only*, did not meet the requirement of the Article. Card 5095, *October, 1898*.

325. *Held* that a department commander could not legally depute a staff or other officer to act for him, while absent from his headquarters on an expedition against Indians, in approving, &c., the sentences of courts martial previously duly convened by him. XXXVII, 429, *March, 1876*.

326. The "officer commanding for the time being," indicated in this Article, is an officer who has succeeded to the command of the officer who convened the court; as where the latter has been regularly relieved and another officer assigned to the command; or where the command of the convening officer has been discontinued, and merged in a larger or other command, at some time before the proceedings of the court are completed and require to be acted upon. Thus, where, under these circumstances, a separate brigade has ceased to exist as a distinctive organization and been merged in a division, or a division has been similarly merged in an army or department, the commander of the division in the one case and of the army or department in the other, is "the officer commanding for the time being," in the sense of the Article. VIII, 633, *July, 1864*; IX, 621, *September, 1864*; XIII, 298, *January, 1865*; XX, 153, 194, *November, 1865*; Cards 5231, *October, 1898*; 5274, 5294, *November, 1898*; 5471, *December, 1898*.

327. Where, pending action upon the sentence of a general court-martial convened by a division commander, the division was discontinued and the organizations composing it were distributed among the divisions of a corps, *held* that the commander of such corps was the "officer commanding for the time being" and the proper officer to act upon the sentence. Cards 5274, 5294, *November, 1898*.

328. Where, pending action upon the sentence of a general court

martial by a department commander, the regiment to which the accused belonged was transferred to an army corps outside the department, *held*, as the department command still existed, that the commander thereof remained the proper authority to act upon the sentence. Cards 4942, *September, 1898*; 7166, *October, 1899*.

**329.** Where a separate brigade was merged in a division, *advised* that a court convened by the commander of the separate brigade need not be dissolved on account of the merger, but may legally try all the cases which have been referred to it, the division commander becoming the reviewing authority. Card 5151, *October, 1898*.

**330.** Where, before the proceedings of a garrison court convened by a post commander were completed, the post command had ceased to exist, and the command become distributed in the department, *held* that the department commander, as the legal successor of the post commander, was the proper authority to approve the sentence under this Article. XLII, 48, *November, 1873*.

**331.** The fact that the officer who approves the sentence is the "officer commanding for the time being," *i. e.*, has succeeded to the command of the officer who convened the court, should be disclosed by his action on the case as reviewing authority. Cards 5078, 5079, 5080, *September, 1898*.

**332.** The officer authorized to act upon the sentence is the proper authority to promulgate by order the proceedings of the court and his action thereon. If the regiment of the accused has moved outside the limits of the command at the date of such promulgation, a copy of the order promulgating the findings and sentence should be forwarded to the commanding officer of the accused. Card 5235, *November, 1898*.

**333.** Where a department command was discontinued, without being transferred to or included in any other specific command, *held* that the General in command of the Army was "the officer commanding for the time being," and the proper authority to act, under this Article and the 109th, upon the proceedings and sentence of a court which had been ordered by the department commander but whose judgment had not been completed at the time of the discontinuance of the command. XV, 503, *July, 1865*.

**334.** A. R. 187 (205 of 1901) prescribes that the military establishment is under the orders of the Commanding General of the Army in that which pertains to its discipline and military control. A. R. 189 (207 of 1901) prescribes that territorial departments are established and their commanders assigned by direction of the President, and the 104th Article of War declares that no sentence of a court-martial shall be carried into execution until the same shall have been approved by the



officer ordering the court, or by the officer commanding for the time being. Where, therefore, a department commander was relieved from command of a department and no successor had been assigned thereto by the President, *held* that until such assignment the Commanding General of the Army was as such, though not expressly assigned to the command of the department, the "officer commanding for the time being" within the meaning of the 104th Article of War. Card 3142, April, 1897.

335. The "officer commanding for the time being" must, to legally act, have the necessary qualifications. Thus, where the sentence is one of a general court-martial, this officer must have the same rank and *status* as the convening officer must have had under the 72d Article, *i. e.*, he must be either a general officer commanding the army, division or department, or a colonel commanding the department. XLVII, 92, June, 1883.

#### ONE HUNDRED AND FIFTH ARTICLE.

No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerrilla marauders, convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.

#### ONE HUNDRED AND SIXTH ARTICLE.

In time of peace no sentence of a court-martial directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President.

336. The word "approved," employed by the President in passing upon a sentence of dismissal, *held* to be substantially equivalent to "confirmed," the word used in the Article. In practice the two words are used indifferently in this connection. XLI, 12, September, 1877.

337. The Article does not require that the confirmation of the sentence shall be signed by the President, nor does it prescribe any form in which the confirmation shall be declared. *Held*, therefore, that a written approval of a sentence of dismissal authenticated by the signature of the Secretary of War or expressed to be by his order, was a sufficient confirmation within the Article; the case being deemed to be governed by the well-established principle that where, to give effect to an executive proceeding, the personal signature of the President is not made essential by law, that of the head of the department to which the subject belongs shall be sufficient for the purpose; the assent of the President to his order or direction being presumed, and his act being

deemed in law the act of the President whom he represents.<sup>1</sup> IX. 44, *May, 1864*; XXIII, 654, *August, 1867*; XXXVII, 650, *June, 1876*; XXXVIII, 107 and 243, *June and August, 1876*; XXXIX, 296, *November, 1877*; XLI, 25, *September, 1877*; XLII, 209, *March, 1879*; XLIII, 106, *December, 1879*.

#### ONE HUNDRED AND SEVENTH ARTICLE.

No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs.

338. In view of the provisions of the 106th and this Article, *held*, that when *in time of war* a department commander is the reviewing authority no confirmation of a sentence of dismissal by higher authority is necessary,<sup>2</sup> but when a division or separate brigade commander is the reviewing authority, such sentence must be confirmed by the general commanding the army in the field to which the division or brigade belongs. Card 8240, *April, 1899*. And in the latter case if the division or brigade does not belong to a separate army in the field, the commanding general of the Army of the United States would be the proper confirming authority, within the meaning of this Article. Card 4980, *September, 1898*.

#### ONE HUNDRED AND EIGHTH ARTICLE.

No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution until it shall have been confirmed by the President.

#### ONE HUNDRED AND NINTH ARTICLE.

All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles.

SEE ONE HUNDRED AND FOURTH ARTICLE.

<sup>1</sup> This view has been sustained by an opinion of the Attorney-General of June 6, 1877 (15 Opins., 290), and by a Report of the Judiciary Committee of the Senate of March 3, 1879, Rep. No. 868, 46th Cong., 3d Sess. From this report, indeed, two members of the committee dissented in a subsequent report of April 7, 1879,—Misc. Doc., No. 21, 46th Cong., 1st Sess.

This subject has been more recently considered by the U. S. Supreme Court in a succession of cases (Runkle v. U. S., 122 U. S., 543, U. S.; Page, 137 U. S., 673, U. S.; Fletcher, 148 U. S., 84), the effect of which is that a statement of approval of a sentence of dismissal, authenticated by the Secretary of War, is legally sufficient, provided that it appear by clear presumption therefrom, that the proceedings have actually been submitted to the President.

In an opinion of the Attorney General of April 1, 1879 (16 Opins., 298), it was held that a confirmation of a sentence of dismissal of an officer, though irregularly and unduly authenticated, would be *ratified* by an appointment by the President of another officer to fill the supposed vacancy, and that the appointment thus made would be valid and operative.

<sup>2</sup> As to dismissal of general officers, however, see 108th Article.



ONE HUNDRED AND TENTH ARTICLE.<sup>1</sup>

No sentence adjudged by a field officer, detailed to try soldiers of his regiment, shall be carried into execution until the same shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post or camp.

## ONE HUNDRED AND ELEVENTH ARTICLE.

Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and in such case, he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court.

339. An officer suspending the execution of a sentence for the action of the President under this Article should first formally *approve* the same. Simply to forward the proceedings stating that the sentence has been suspended, is incomplete and irregular. IV, 337, *November, 1863*; IX, 15, *May, 1864*. If the commander *disapproves* the sentence, he should not of course suspend and transmit under this Article, since there remains nothing for the President to act upon. II, 50, *March, 1863*.

340. Where a case is submitted to the President for his action under this Article, he may approve or disapprove the sentence in whole or in part, and, if approving, may exercise the power of remission or mitigation. III, 492, *August, 1863*; VII, 594, *April, 1864*.

## ONE HUNDRED AND TWELFTH ARTICLE.

Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge.

341. The power to remit or commute sentences of *death* and *dismissal* remains with the President. A military commander cannot exercise such power, even where, in time of war, he is authorized to approve and execute the sentence. He may then, however, if he thinks that the sentence should be remitted or commuted, suspend its execution for the action of the President (with a recommendation to clemency) under the preceding Article.<sup>2</sup> II, 67, *March, 1863*.

342. A military commander vested with the power of pardon or mitigation under this Article is not authorized to delegate the same to an inferior. Thus *held* that a department commander could not legally authorize a post commander to remit in part, upon good behavior, the

<sup>1</sup> Repealed by section 2, act of June 18, 1898, establishing the summary court.

<sup>2</sup> See 6 Opins. At. Gen., 123, 124-125.

punishment of a soldier under sentence at the post of the latter, who had been convicted by a general court, convened, and whose proceedings had been acted upon, by the former. XXXIII, 119, *June, 1872*.

343. A punishment cannot be pardoned or mitigated under this Article where it has been once duly executed. Where, however, a sentence has been executed only in part, it may be remitted as to the portion remaining unexecuted. II, 29, *February, 1863*.

344. The pardoning power here given is not limited in its exercise to the moment of the approving of the sentence, but may be employed as long as there remains any material for its exercise. Under this Article, as interpreted by the usage of the service, a department (or army) commander may remit *at any time*, in his discretion, for any cause deemed by him to be sufficient, the unexecuted portion of the sentence of any soldier confined *in his command* under a sentence imposed by a court-martial convened by him or by a predecessor in the command. V, 71, *September, 1863*; VI, 35, *March, 1864*; VIII, 582, *June, 1864*; XXI, 49, *November, 1865*; XXVI, 463, *February, 1868*; XXVII, 243, *September, 1868*.

345. The reviewing authority, in approving the punishment adjudged by the court and ordering its enforcement, is authorized, if he deems it too severe, to graduate it to the proper measure by reducing it in quantity or quality, without changing its species: this is *mitigation*. XXXVII, 22, *June, 1875*; XII, 518, *March, 1879*. Imprisonment, fine, forfeiture of pay, and suspension, are punishments capable of mitigation. As an instance of a mitigation both in quantity and quality, *held* that a sentence of imprisonment for three years in a penitentiary was mitigable to an imprisonment for two years in a military prison. XII, 518, *supra*.

346. *Held* that it was not a due exercise of the power given by this Article, but irregular and unauthorized, for a post commander to suspend the execution of the sentence of a garrison court convened by him, during good behavior on the part of the soldiers sentenced. XXX, 115, *February, 1870*.

347. *Held* that a reviewing officer other than the President, was not empowered by this Article to *commute* a punishment; that the "pardon" here specified was *remission*, which, unlike the pardoning power vested in the President, did not include commutation or conditional pardon. So, *held* that a reviewing commander was not authorized to commute the punishment of dishonorable discharge, and that, as such punishment was not susceptible of mitigation, it could not legally be reduced under this Article. LVII, 89, *October, 1888*; 32, 401, *May, 1889*.

348. The substitution of the punishment of confinement for that of dishonorable discharge, imposed by sentence of court martial, would

not, of course, be authorized by way of *mitigation* (which can not change the nature of the punishment), but may be effected by a commutation of the sentence by the President.<sup>1</sup> 32, 401, *May, 1889*; 34, 237, *August, 1889*.

349. Where a prisoner is serving out a sentence of imprisonment at a military prison or place of confinement within the command of the officer who approved the proceedings, such officer (or his successor in the command) may, under this Article, *remit* at any time the unexpired portion of the pending confinement,<sup>2</sup> although the punishment of dishonorable discharge, imposed by the same sentence, may meanwhile have been duly executed. 57, 371, *January, 1893*.

350. Where a soldier was sentenced to a term of confinement and at the end of the term to be dishonorably discharged, and pending the confinement the unexecuted portion of the sentence was remitted, *held*, that such remission included the dishonorable discharge, as the same under the terms of the sentence remained to be executed. XX, 460, *March, 1866*.

351. A soldier was sentenced to be confined for a term, and at the end of such term to be dishonorably discharged. At the end of the term he was at once restored to duty and continued on duty. *Held* that such restoration operated as a constructive pardon and remitted the unexecuted part of the sentence, to wit the punishment of dishonorable discharge.<sup>3</sup> 51, 126, *December, 1891*.

352. A punishment in itself illegal is not capable of *mitigation*. Thus where a sentence of imprisonment in a penitentiary is not legally authorized, it cannot be made valid by mitigating this imprisonment to confinement in a military prison. In such case the latter will be equally invalid and inoperative with the original punishment.<sup>4</sup> 29, 209, *January, 1889*; 43, 151, *October, 1890*; 53, 181, *April, 1892*.

353. A substitution, for a punishment of dishonorable discharge with loss of all pay and allowances due and to become due, of a punishment of confinement at hard labor at the post for one year with forfeiture of ten dollars per month for the same period, *held* not a legitimate mitigation, the confinement at hard labor being a substitution of an entirely different punishment from that awarded by the court. XLVIII, 666, *January, 1885*. So where the substitution for such a sentence was

<sup>1</sup> See instance of such commutation by the President in the case of Private Hayes, 5th Artillery, in G. C. M. O. 58 of 1888.

<sup>2</sup> The counter opinion of the Attorney General, in 19 Opins., 106, was not adopted by the Secretary of War, or followed in practice—as is shown by the terms of par. 916, A. R. (1917 of 1901), and par. 6, p. 62, Manual for Courts-Martial (1901).

<sup>3</sup> See 6 Opins. At. Gen., 714, 715.

<sup>4</sup> But see A. R., 460, as amended (1041 of 1901), which provides that when a penitentiary has been erroneously designated in the sentence the reviewing authority may disapprove that portion of the sentence and designate a proper place.

confinement at hard labor for six months and forfeiture of ten dollars per month for the same period, it was *held* that the confinement, and so much of the forfeiture, if any, as exceeded the pay and allowances due the soldier, were illegal. Card 5887, *February, 1899*.

354. Where a sentence of dishonorable discharge, with forfeiture of all pay and allowances and confinement at hard labor for four years, was *mitigated* to confinement for one year with forfeiture of ten dollars per month for the same period, *held* that the same was regular and legal and not in contravention of Circ. No. 2, A. G. O. of 1885.<sup>1</sup> L, 96, *March, 1886*; Card 9328, *November, 1900*.

355. Dishonorable discharge cannot legally be mitigated to "discharge without a character." The latter is not a recognized punishment. 43, 176, *October, 1890*.

356. *Held* that "good conduct time" to a prisoner's credit should not be deducted from the shortened sentence in a case where it has been ordered that he "be released after he has been confined a certain number of months." A mitigation so expressed is not equivalent to a reduction of the term to the number of months stated but it means that the prisoner will be released after he has been in actual confinement for that time. Card 3862, *February, 1898*.

357. The order prescribing maximum punishments was not intended to and does not affect the established principle that the reviewing authority, in the exercise of his power of mitigation, can not change the kind of punishment. The power of substitution which may be exercised by the court under the order has no relation to the power of the reviewing officer. Thus *held* that the substitution by the reviewing officer of confinement for forfeiture, though the period of confinement proposed were less than the court could have substituted, would not be legal mitigation. Card 3487, *September, 1897*.

358. An officer under a sentence of suspension for five years, with forfeiture of one quarter of his pay, applied to be allowed to receive his full pay for three months, the forfeiture imposed by the sentence for these months to be satisfied in one sum from the pay of the month next succeeding. *Held* that such action—for which there was no precedent—would have to be taken, if at all, by way of mitigation, but that the same would amount to a *postponement* of the execution (of a part) of the sentence, which would not be legitimate mitigation. 61, 132, *August, 1893*.

<sup>1</sup> A legal sentence of dishonorable discharge, forfeiture of all pay and allowances due and confinement at hard labor for a definite period, may be mitigated by the authority approving such sentence to confinement at hard labor and forfeiture of pay and allowances, for a period not to exceed the period of confinement awarded in the sentence. Court-Martial Manual of 1901, p. 63, par. 8.



## ONE HUNDRED AND THIRTEENTH ARTICLE.

Every judge-advocate, or person acting as such, at any general court-martial, shall, with as much expedition as the opportunity of time and distance of place may admit, forward the original proceedings and sentence of such court to the Judge-Advocate-General of the Army, in whose office they shall be carefully preserved.

## ONE HUNDRED AND FOURTEENTH ARTICLE.

Every party tried by a general court-martial shall, upon demand thereof, made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court.

359. A copy of the proceedings and sentence cannot properly be furnished under this Article till the same have been finally acted upon and such action has been promulgated in the usual manner. XIX, 624, and XXI, 386, *May, 1866*.

360. A person applying for the copy, "in behalf" of the accused, should exhibit some satisfactory evidence that he duly represents the accused, as his agent, attorney, or otherwise. Where it does not satisfactorily appear that the party is applying for and on behalf of the accused, he cannot be furnished with the copy, as of right, under the Article. A person other than the accused, applying on his own account, is not entitled to the copy. III, 409, *August, 1863*; XIX, 318, *January, 1866*; XXI, 12, *November, 1866*; XXXI, 499, *July, 1871*; XXXVII, 106, *November, 1875*. The fact that the applicant is a member of the family of the accused does not entitle him to the copy in the absence of evidence that he applies at the instance or in behalf of the accused. III, 348, *August, 1863*. A party applying in behalf of "friends and creditors" of the accused, *held* not entitled to a copy of the record of his trial. XXI, 583, *August, 1866*. So *held* of one who subscribed his application merely as "attorney at law," without showing that he was authorized to act for the accused. XIX, 459, *March, 1866*.

361. Applications for copies under this Article may be, and in practice commonly are, addressed in the first instance to the Judge-Advocate General,<sup>1</sup> who thereupon furnishes the copy, certified by him as correct, at the expense of the United States, provided the application is made by the accused or in his behalf. If not, he can furnish the copy only by the special authority of the Secretary of War. Any person desiring a copy of the record of a court martial, or of any portion of a record, who is not entitled to be furnished with the same by the terms of this Article, should apply therefor to the Secretary of War, stating the reason for his application, in order that it may appear that he makes the same in good faith and for a proper purpose. If the application is

<sup>1</sup>See A. R., 894 (265 of 1901), and par. 2, p. 69, Manual for Courts-Martial (1901).

approved by the Secretary, it will be referred to the Judge-Advocate General, who will then have the copy prepared and transmitted. XIX, 635, *May, 1866*; XXXI, 499, *July, 1871*; XXXVII, 106, *November, 1875*.

362. The accused or other person entitled under this Article to be furnished with a copy of a record of trial, is not entitled to be furnished with a copy of a report of the Judge-Advocate General made upon the case. To receive this, special authority must be obtained from the Secretary of War. XIX, 657, *June, 1866*; XXXII, 54, *October, 1871*.

363. The furnishing of a copy of a record of a general court martial to a person other than the accused and not applying in his behalf, will, as a general rule, be authorized by the Secretary of War, where the application is evidently made in the interest of justice and the copy furnished will clearly subserve a good and desirable purpose. But this must be made certainly to appear. XXI, 336, *April, 1866*.

364. It is only a party "tried by a general court martial" who is entitled by the Article to the copy. Parties desiring copies of records of *courts of inquiry*, for the use in evidence under Art. 121, or for other purpose, must apply to the Secretary of War, as indicated in § 361, *ante*. Such copies, however, are rarely accorded, except for use under Art. 121. I, 427, *November, 1862*; XLV, 158, *February, 1882*.

365. This Article does not authorize the furnishing of a copy of the record of trial to the widow of the accused or other person applying after his decease. LVI, 17, *March, 1888*; 25, 188, *June, 1888*.

#### ONE HUNDRED AND FIFTEENTH ARTICLE.

A court of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, may be ordered by the President or by any commanding officer, but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed, in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any commanding officer except upon a demand by the officer or soldier whose conduct is to be inquired of.

366. This Article authorizes the institution of a *court of inquiry*<sup>1</sup> only in a case of an "officer or soldier," and the word "officer," as employed in the Articles, is defined, by Sec. 1342, Rev. Sts., to mean commissioned officer. A court of inquiry cannot therefore be convened on the application, or in a case, of a person who is not an officer

<sup>1</sup>A court of inquiry is not a *court* in the legal sense of the term, but rather a council, commission, or board of investigation. It does not administer justice; no plea or specific issue is presented to it for trial; its proceedings are not a trial of guilt or innocence; it does not come to a verdict or pass a sentence. For purposes of investigation, however, a court of inquiry in this country is clothed with ample powers; and, in an important case, its opinion may be scarcely less significant and even final than that of a military court proper, that is to say a court martial. I Winthrop's Military Law and Precedents, Ch. XXIV.



(or soldier) of the army at the time. Such a court cannot be ordered to investigate transactions of, or charges against, a party who, by dismissal, discharge, resignation, &c., has become separated from the military service, although such transactions, or charges, relate altogether to his acts or conduct while in the army. I, 395, 402, *November, 1862*; XIX, 71, *October, 1865*; XXVII, 601, *April, 1869*; XXXIX, 619, *August, 1878*; XLI, 263, *June, 1878*. A court of inquiry cannot be ordered in a case of an "acting assistant surgeon," who is not an officer of the army but only a civil employee. XXXVIII, 210, *August, 1876*.

367. A court of inquiry should not in general be ordered by an inferior—post or regimental—commander, where the charges required to be investigated are not such as an inferior court martial could legally take cognizance of. Courts of inquiry convened by such commanders are, however, of rare occurrence in our service. XXXII, 163, *December, 1871*; XXXV, 562, *September, 1874*.

368. Though a court of inquiry has sometimes been compared to a grand jury, there is little substantial resemblance between the two bodies. The accused appears and examines witnesses before such a court as freely as before a court-martial (see Art. 118), and its proceedings are not required to be secret but may be open at the discretion of the court.<sup>1</sup> XXVIII, 586, *May, 1869*.

#### ONE HUNDRED AND SIXTEENTH ARTICLE.

A court of inquiry shall consist of one or more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.

#### ONE HUNDRED AND SEVENTEENTH ARTICLE.

The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward—So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A B, do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

<sup>1</sup> Although neither Art. 88, or other provision of the code, specifically authorizes the challenging of the members of a court of inquiry, yet, in the interests of justice and by the usage of the service in this country, this proceeding is permitted in the same manner as before courts-martial. Art. 117 requires that members of courts of inquiry shall be sworn "well and truly to examine and inquire, according to the evidence, without partiality, prejudice, &c., and it is the sense of the service that their competency so to do should be liable to be tried by the same tests as in a case of a court-martial. See Macomb, § 204, O'Brien, 292; De Hart, 278. In the Joint Resolution of Congress of Feb. 13, 1871 authorizing the President to convene a certain special court of inquiry, it was "provided that the accused may be allowed the same right of challenge as allowed by law in trials by court-martial." It appears, however, to have been regarded in the debate on this Resolution (see Cong. Rec., vol. 2, New 38-40) that this provision was unnecessary to entitle the party to the privilege.

## ONE HUNDRED AND EIGHTEENTH ARTICLE.

A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge-advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martials,<sup>1</sup> and the party accused shall be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.

## ONE HUNDRED AND NINETEENTH ARTICLE.

A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.

**369.** An opinion given by a court of inquiry is not in the nature of a sentence or adjudication pronounced upon a *trial*. The accused, upon a subsequent trial, by court martial, of charges investigated by a court of inquiry, cannot plead the proceedings or opinion of the latter as a former trial, acquittal, or conviction. XVI, 389, *July, 1865*; XXIX, 98, *July, 1865*.

**370.** While it is of course desirable that the members of a court of inquiry, directed to express an opinion, should concur in their conclusions, they are not *required* to do so by law or regulation.<sup>2</sup> The majority does not govern the minority as in the case of a finding or sentence by court-martial. If a member or a minority of members cannot conscientiously and without a weak yielding of independent convictions agree with the majority, it is better that such member or members should formally disagree and present a separate report (or reports) accordingly. The very disagreement indeed of intelligent minds is a material and important fact in the case, and one of which the reviewing authority is entitled to have the advantage in his consideration of and action upon the same. XII, 207, *April, 1878*.

**371.** Where, as in the majority of cases, the inquiry is instituted with a view of assisting the determination by the President, or a military

<sup>1</sup> A court of inquiry has no power to punish us for a contempt. Such power of this nature as is conferred by Art. 86 is restricted in terms to courts-martial. Moreover a court of inquiry, not being in a proper sense a *court*, cannot exercise the strictly judicial function of punishing contempts. A loose observation of Hough (Authorities, 10) that "contempts before courts of inquiry are as much punishable as before courts-martial," has been carelessly repeated by several American writers. The recent English writer, Clode, correctly states the law (as to witnesses) in saying (Mil. and Mar. Law, 198) that a court of inquiry "has no power to punish them for contumacy or silence." The act of March 2, 1901 (G. O. 27, G. O., 1901), providing for the punishment of civilian witnesses refusing to appear or testify, is limited by its terms to general courts-martial.

<sup>2</sup> In the case of the court of inquiry (composed of seven general officers), on the Cintra Convention, in 1808, the members who dissented from the majority were required by the conveying authority to put on record their opinions, and three dissenting opinions were accordingly given. A further instance, in which two of the five members of the court gave each a separate dissenting opinion, is cited by Hough (Presidents), 642. Mainly upon the authority of the former case, both Hough (Presidents), 642, and Simmons, § 339, hold that members not concurring with the majority are entitled to have their opinions reported in the record.

commander, of the question whether the party should be brought to trial, the opinion of the court will properly be as to whether further proceedings before a court-martial are called for in the case, with the reasons for the conclusions reached. Where no such view enters into the inquiry, but the court is convened to investigate a question of military right, responsibility, conduct, &c., the opinion will properly confine itself to the special question proposed and its legitimate military relations. A court of inquiry, composed as it is of military men, will rarely find itself called upon to express an opinion upon questions of a purely legal character.' XVI, 389, *July, 1865*.

#### ONE HUNDRED AND TWENTIETH ARTICLE.

The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.

#### ONE HUNDRED AND TWENTY-FIRST ARTICLE.

The proceedings of a court of inquiry may be admitted as evidence by a court martial, in cases not capital, nor extending to the dismissal of an officer. *Provided*, That the circumstances are such that oral testimony cannot be obtained.

372. While the proceedings of a court of inquiry cannot be admitted as evidence on the merits, upon a trial before a court martial of an offence for which the sentence of dismissal will be mandatory upon conviction;<sup>1</sup> yet *held* that upon the trial of such offence, as upon any other, such proceedings, properly authenticated, would be admissible in evidence for the purpose of impeaching the statements of a witness upon the trial who—it was proposed to show—had made quite different statements upon the hearing before the court of inquiry.<sup>2</sup> XLIII, 339, *June, 1880*.

#### ONE HUNDRED AND TWENTY-SECOND ARTICLE.

If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters shall command the whole, and give orders for what is needful in the service, unless otherwise specially directed by the President, according to the nature of the case.

<sup>1</sup> In an exceptional case, that of the special court of inquiry authorized by Congress in the Joint Resolution of Feb. 13, 1874, the court was required to express an opinion not only upon the "moral," but upon the "technical and legal responsibility" of the officer for the "offences" charged. It is not irregular, but authorized, for a court of inquiry, in a proper case, to reflect, in connection with its opinion, upon any improper language or conduct of the accused, presenting witness, or other person, appearing before it during the investigation. Thus, the court of inquiry on the conduct of the Seminole war, adverted, in its opinion, unfavorably upon certain offensive and reprehensible language employed against each other by the two general officers concerned, the one in his statement to the court, and the other in his official communications which were put in evidence. See G. O. 13, Hdqrs. of Army, 1837.

<sup>2</sup> Compare G. O. 33, Dept. of Arizona, 1871.

<sup>3</sup> See this ruling published, as adopted by the President, in G. C. M. O. 40, Hdqrs. of Army, 1880. See also, G. C. M. O. 88, Navy Dept., 1895.

**ONE HUNDRED AND TWENTY-THIRD ARTICLE.**

In all matters pertaining to the rank, duties, and rights of officers the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period.

**ONE HUNDRED AND TWENTY-FOURTH ARTICLE.**

Officers of the militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States.

**ONE HUNDRED AND TWENTY-FIFTH ARTICLE.**

In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War an inventory thereof.

**ONE HUNDRED AND TWENTY-SIXTH ARTICLE.**

In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.

**ONE HUNDRED AND TWENTY-SEVENTH ARTICLE.**

Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered.

**373.** This Article, in connection with the two preceding Articles, provides for the securing of the effects of deceased officers and soldiers, making inventory of the same, and accounting for them to the proper legal representative, &c. These Articles have special reference to cases of deaths of military persons while in active service in the field or at remote military posts, and their provisions apply only to such effects as are left by the deceased "in camp or quarters." An attempt by the commander, &c., to secure effects left elsewhere would not be within the authority here given, and might subject the officer to the liability of an administrator: such a proceeding would not therefore be advisable.<sup>1</sup> Upon accounting to the duly qualified legal representative, as directed in the Article, the responsibility of the officer is

<sup>1</sup> Compare Samuel, 659; Hough & Practice), 558.



discharged, and it remains for the representative to dispose of the property according to the law applicable to the case. XLIII, 266. *March, 1880*

#### ONE HUNDRED AND TWENTY-EIGHTH ARTICLE.

The foregoing articles shall be read and published, once in every six months, to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service.

#### ABSENCE WITHOUT LEAVE.

**374.** An unauthorized absence from the quarters only, as from 11 p. m. inspection, held not properly chargeable under the 32d Article. This article contemplates an absence from the soldier's "troop, battery, company or detachment"—an absence from the post or command. 47, 133, *May, 1891*; 49, 100, 171, *September, 1891*.

**375.** The statutory authority for the army regulation requiring that deserters restored to duty without trial shall make good time lost by desertion, is found in the 48th Article of War; but there is no such article or other statute with reference to absence without leave. Whether therefore a soldier can by a regulation alone be required to make good time lost by absence without leave is doubtful. 65, 338, *June, 1894*. The soldier by virtue of his contract of enlistment fails to earn and therefore is not entitled to pay and allowances accruing during the period of his unauthorized absence, but it is considered that in the present state of the law his retention in the service to make up time so lost cannot legally be authorized.<sup>1</sup> Cards 1485, *June, 1895*; 1494, *July, 1895*; 3744, *December, 1897*.

**376.** Violations of the 33d Article of War should not be charged as absence without leave under the 32d Article. Card 2838, *December, 1896*.

**377.** Where an officer<sup>2</sup> or soldier on his return from an unauthorized absence is, in consequence of his report of the facts and circumstances of such absence, not proceeded against by his proper commander for the military offence involved, but is by the latter placed upon full duty, such action, under the general custom of the service, may be pleaded as a good defence, if the officer or soldier be subsequently brought to trial for the unauthorized absence. II, 376, 391, *May, 1865*.

**378.** An enlisted man forfeits his pay and allowances during the

<sup>1</sup> This view is not in accordance with the Army Regulations and practice. See A. R., 133 of 1895 & 144 of 1901.

<sup>2</sup> An absence without leave by an officer is laid under the 62d Article of War.



period of an absence without leave, as provided in army regulations. During such absence he renders no service and therefore earns neither pay nor allowances. The forfeiture is thus by operation of law and accrues independently of the result of a trial for the military offence involved in the unauthorized absence. One of the purposes of the muster and pay rolls is to show what service the soldier renders, and if they show that he has rendered none during a particular period by reason of an absence without leave, he is not entitled to pay and allowances during such period.<sup>1</sup> 38, 303, *November, 1889*; 57, 240, *January, 1893*; Card 1494, *June, 1895*. For an absence without leave of less than a day the soldier may of course be tried by court martial and sentenced to suffer a forfeiture, but such absence should not be noted on the muster and pay rolls. 47, 390, *June, 1891*.

#### ACCOMPLICE.

379. In general, where an accomplice offers and is admitted to testify upon the part of the government against an accused person, he is called to the stand under an implied promise that no proceedings will be taken against himself, and that the question of his pardon will be favorably considered, provided he makes a full disclosure of the facts within his knowledge; and this whether or not the accused be convicted by means of his evidence.<sup>2</sup> So, where a party, who had thus been admitted to testify as witness, and had in good faith made a full and frank statement of the circumstances of the offence (of which, however, the accused was acquitted by the court), was himself subsequently brought to trial for the same act, and convicted and sentenced for his part in the same, *recommended* that his sentence be remitted by the President. XI, 590, and XIV, 259, *March, 1895*.

#### ACCOUNTABILITY OF OFFICER.

380. There is neither law nor justice in holding an officer of the army pecuniarily accountable to the United States where the U. S. has lost nothing by his act; or in holding him so accountable where, though there has been such loss, the same was not occasioned by his act. He may indeed be amenable to court-martial for some neglect of duty

<sup>1</sup> U. S. v. Lamborn, 92 U. S. 77, 79.

<sup>2</sup> See *King v. Ridd*, Cowper, 331; *United States v. Lee*, 4 McLean, 103; *Whiskey Cases*, 9 Otto, 504; *People v. Whipple*, 9 Cowen, 707; 1 Chitty Cr. L., 768-9; 1 Bishop Cr. Proc., § 1075-6, and notes; also Report (No. 352) of Committee on Judiciary of H. of Reps., 44th Cong., 1st Sess., March 31, 1876.

involved in the act and properly brought to trial therefor, but this is a wholly distinct liability. 46, 340, *April, 1891*.

381. A recruiting officer's clerk (a corporal), having access to blank transportation requests, filled out several in favor of a railroad company, forged thereto the name of the officer and disposed of the same. The forged requests were paid by a disbursing officer. *Held*, that the latter having paid out money of the United States on forged vouchers was alone legally accountable for the loss. If the officer who permitted access to the blank requests thereby committed a military offence, his amenability for such offence could be enforced only by means of a trial, conviction and punishment by court-martial. Whatever may be the legal effect of par. 35, Circular 7, A. G. O., 1892, the loss in question occurred prior to the promulgation of the circular. 56, 208, *October, 1892*.

382. Where an officer, having had entrusted to him by another officer a medal of honor, intended for and to be delivered to an enlisted man, gave such care to its safe-keeping as he gave to his own property, locking it up in his trunk for the purpose of transportation—*held* that he was not legally accountable for the loss of the medal *in transitu*. He was simply a gratuitous bailee of whom is required only the lowest degree of care and who is not liable for a loss which is not the result of gross negligence. 44, 382, *December, 1890*.

383. A person who, as an officer of the army, has been subjected under Sec. 1304, Rev. Sts., to a charge, against his pay, of the money value of military stores deficient or damaged for which he has been held accountable, cannot, after he has ceased to be such officer and has left the army, be relieved from such liability by the Secretary of War under that Section. For such relief he must have recourse to Congress. 65, 137, *May, 1894*.

#### "ACTING ASSISTANT" OR "CONTRACT" SURGEON.

384. A "contract" or "acting assistant" surgeon is not a military officer and has no military rank or status. He is amenable indeed to the military jurisdiction when employed with the army in the field *in time of war* (see SIXTY-THIRD ARTICLE); but he is in fact no part of the military establishment; is simply a civilian employed by the United States, under a special contract for his personal services as a medical attendant to the troops. When not serving with troops before the enemy he has no other relation to the military organization or the government than that established by the terms of his contract, made

in accordance with the army regulations. IX, 678, *October, 1864*; XXVI, 18, *September, 1867*; XXVIII, 239, *November, 1868*; XXXIV, 207, *April, 1873*; LII, 304, *June, 1887*. He is not subject to military orders in general, like an officer or soldier, but only to such orders or directions as properly pertain to the performance of his particular duties. XXVII, 242, *September, 1868*. He is of course not eligible for detail as a member of a military court. XXII, 542, *December, 1866*; XXX, 109, *February, 1870*. As a civilian, however, he is entitled to the *per diem* allowance, &c., when duly attending a court martial as a witness. XXIV, 186, *January, 1867*.

**385.** Acting assistant or contract surgeons are neither privates, non-commissioned officers nor officers. They were during the war of the rebellion and still are necessarily assimilated as to their duties, pay and status to assistant surgeons of the army. When serving with the forces in the field they are subject to military discipline and to the jurisdiction of courts martial under the provisions of the 63d Article of War. They were creatures solely of army regulations and orders, which are executive mandates wholly powerless to constitute them officers of the army. These regulations and orders could and did authorize commanders to "employ" civil or "private" physicians to render professional services in connection with the medical department of the army, but could not and did not commission or make them regular or volunteer officers. 52, 404, *March, 1892*; 53, 167, *April, 1892*; 65, 226, *June, 1894*; Card 1128, *March, 1895*.

**386.** As a contract surgeon was not an officer of the army, an enlisted man could legally be employed to act as one. So *held* that the employment by the military authorities in 1862 of a "first class musician" of the band of a volunteer regiment (an enlisted man) to act as a contract surgeon, was not illegal. 65, 259, *June, 1894*.

**387.** A contract surgeon, not being, in the legal or statutory sense, an officer of the army, *held* not entitled to the benefit of the act of March 3, 1885, c. 335, "to provide for the settlement of claims of officers and enlisted men of the army for the loss of private property." XLIX, 246, *July, 1885*.

**388.** *Held* that a civilian physician, employed (between 1866 and 1868) under contract, by the "Bureau of Refugees, Freedmen and Abandoned Lands", was not a contract surgeon within the application of Sec. 4693, Rev. Sts., relating to pensions, inasmuch as he did not render service with a "military force in the field", or even in attend-

<sup>1</sup> See U. S. v. Saunders, 120 U. S., 126, to the effect that one person may legally hold two distinct offices, places, or employments, at the same time, under the United States.

ing members of the military establishment; such bureau being no part of such establishment.<sup>1</sup> 63, 97, *December, 1893.*

389. A contract surgeon was appointed under the provisions of the act of Congress approved May 12, 1898, and the contract provided, *inter alia*, that "when on duty at a post or station where there are no public quarters, he shall receive the commutation for quarters allowed by law to assistant surgeons of the rank of first lieutenant." *Held* that commutation of quarters was "compensation" within the meaning of the said act of May 12, 1898, and could not therefore be paid in addition to the one hundred and fifty dollars per month authorized by the act. Neither the terms of the contract nor the army regulations (par. 994) could authorize what the statute law prohibited. Card 5142, *October, 1898.*

390. The contracts entered into with acting assistant surgeons appointed under the act of Congress approved May 12, 1898, after specifying the money compensation contain the following provision: "All of which shall be his full compensation and in lieu of all allowances and emoluments." *Held*, that this provision did not deprive an acting assistant surgeon of the privilege of buying fuel from the quartermaster's department as provided in par. 999 of the Army Regulations, this privilege not being an allowance or emolument. Card 4988, *September, 1898.*

391. A contract surgeon can not legally be compelled to remain in the service against his consent after the expiration of the term of his contract. Card 8618, *July, 1900.*

#### ADJOURNMENT.

392. The adjournment from day to day of a military court is not required, by law or regulation, to be authenticated by the signatures of the president and judge-advocate. VIII, 507, *June, 1864.*

393. While the practice of noting the adjournment of the court at the end of the record of a trial is a usual and proper one, and is often of

<sup>1</sup> No specific appropriation for the pay, &c., of "contract surgeons" was made between 1891 and 1898. The act of February 12, 1895, provided however for the employment of "civil physicians" by the surgeon general. But the act of May 12, 1898, provides that in emergencies the Surgeon General of the Army, with the approval of the Secretary of War, may appoint as many contract surgeons as may be necessary at a compensation not to exceed one hundred and fifty dollars per month.

From 1888 to 1891 appropriations for mileage to contract surgeons was made in the annual appropriation acts and again since 1898.

That contract surgeons are not officers of the army, see 26, Ct. Cls., 302, 303; Digest Second Comp. Dec., vol. 3, secs. 929, 932. 1 Comp. Dec. 629, 631.

But General Order 151, A. G. O., 1898, amending A. R., 85 (99 of 1901), relating to the burial expenses of officers of the Regular or Volunteer Army who are killed or who die in the service, was construed by the War Department, December 14, 1898, to include contract surgeons. See also circulars 41 and 55, A. G. O., 1899.

service in indicating the sequence of the cases tried and the course and order of the business transacted, a statement of such adjournment is not an essential part of the record of proceedings, and its omission will not affect their validity. XXIII, 627, *August, 1867*; XXXIII, 456, *November, 1872*.

394. Where the order convening a military court is in the more usual form, requiring it, generally, to try such cases as may be brought before it, an adjournment at some period of its sessions without a day fixed for its reassembling will not preclude its meeting again and continuing its sessions till its business is terminated. XXI, 91, *December, 1865*.

395. An adjournment "*sine die*" of a court martial is quite without legal significance, having no more legal effect than a simple adjournment.<sup>1</sup> Such an adjournment does not dissolve the court, since a military court has no power to terminate its own existence or divest its authority.<sup>2</sup> XXI, 670, *November, 1866*; XXVI, 588, *June, 1868*; XLII, 158, *February, 1879*.

## AID-DE-CAMP.

396. The aids of the General of the Army, though not holding the appointment or *office* of colonel of the army, are invested by law (see, 1096, Rev. Sts.) with the *rank* of colonel upon their selection as aids and while acting as such.<sup>3</sup> They are therefore entitled to sit upon courts-martial and boards according to this rank, as dating from their selection.<sup>4</sup> XXX, 168, *March, 1870*.

397. *Held* (December, 1864) that the "additional aids-de-camp," authorized by the act of August 5, 1861, were a part of the regular army. They were appointed by the President and confirmed by the Senate, and the Act creating them provided that they should "bear the rank and authority of captains, majors, lieutenant colonels, or colonels of the regular army." Moreover, this act was expressly entitled as "supplementary" to the Act to increase the military establishment of the United States, of July 20 of the same year, which provided for an increase of the regular army by the addition of new regiments. And although the act of Aug. 5, 1861, provided for the appointment of these

<sup>1</sup> See *Brown v. Root*, Supreme Court, D. C., 1900 (44087, Law).

<sup>2</sup> A court martial in session at a military post or station is authorized to adjourn to the quarters, at the same post or station, of a sick witness and there take his testimony, if he is in fact, as certified by the medical officer, too ill to come to the court room. See G. O. M. O. 37, Dept. of the East, 1870.

<sup>3</sup> This ruling is adopted in the opinion of the Attorney General of August 11, 1880. Compare the opinion of the Court of Claims in *Wood v. United States*, 15 Ct. Cls., 151.

<sup>4</sup> Similarly held by the Secretary of War in the case of an aid of the Lieut. General, of the rank of lieutenant colonel, detailed upon a court martial for the trial of a cadet in 1870.



aids only during the rebellion, and for their discharge when not employed in active service, and their reduction in number at the discretion of the President, yet provisions of a similar character, applicable to regular officers, are contained in sec. 6 of the principal act of July 29. It is not essential to an office in the "regular" army that its term be without statutory limit. XI, 267, *December, 1864*.

398. It is substantially laid down as a general rule in Circ. No. 1 A. G. O., 1883, that aids-de-camp shall be entitled to be paid as such only from the day upon which they *report in person* for duty. It may however be too strict to insist upon such a rule in every case, since it is possible that duty may be duly devolved upon an aid-de-camp by his General prior to his arriving and reporting at the headquarters. But exceptions to the general rule should not be admitted except where clearly justified. 61, 237, *August, 1893*.

399. A civilian during the war of the rebellion, while with a general officer in the Army of the Potomac, often carried messages for him, voluntarily performing the duties usually performed by an aid-de-camp. Subsequently, in 1890, he asked that he be placed on the muster rolls and discharged. *Held*, that never having been mustered his name ought not be on the rolls. That never having been in the status of a soldier there was nothing upon which to base a discharge from such status. *Advised*, that his request could not be granted. Further *held*, that he was not, within the meaning of the proviso of Civil Service rule X, "a person who served in the military service of the United States in the war of the rebellion and was honorably discharged therefrom." 37, 462, *January, 1890*.

#### ALASKA.

400. By the treaty of cession with Russia, subjects of that nation inhabiting the Territory of Alaska at the date of the treaty and continuing to remain such inhabitants for three years, became thereupon American citizens. But the treaty neither mentions nor refers to British subjects or the subjects of any foreign nation other than Russia: such persons, therefore, residing in the Territory, can become citizens only in the mode and form prescribed by the U. S. naturalization laws. XXXVIII, 555, *April, 1877*.

#### ALIEN.

401. Aliens, honorably discharged after enlisting in our army, are not, by such discharge alone, made citizens, but they are thereupon entitled (under a provision of the act of July 17, 1862, now Sec.

2166, Rev. Sts.) to be admitted to become citizens without previous declaration of intention, upon merely presenting to the proper court (see Sec. 2165, Rev. Sts.) a petition for the purpose, accompanied by proof of at least one year's residence within the United States previous to the application, of good moral character, and of the fact of honorable discharge.<sup>1</sup> XXVII, 69, *July, 1868*; XXIX, 295, 369, *September and October, 1869*; XXXI, 255, *March, 1871*; 21, 108, *December, 1887*.

402. *Held* that Sec. 2166, Rev. Sts., did not apply to the case of an alien honorably discharged from an enlistment as a seaman in the navy; the term "armies of the United States," employed in the statute, being deemed to refer (as in the Constitution) only to the military force proper.<sup>2</sup> XLI, 613, *July, 1879*.

403. Under the act of July 30, 1892, an enlisted man, to be eligible for promotion as commissioned officer, must be a citizen of the United States. And, in order to be promptly naturalized, under Sec. 2166, Rev. Sts., he must first be honorably discharged. So, *advised* that such alien, to be qualified for examination and appointment under the act, should be discharged and, after naturalization, be re-enlisted. 62, 156, *October, 1893*.

404. *Held* that there was no law precluding an alien residing in the United States, the subject of a foreign government with which we are at peace, from displaying the flag of his country on his dwelling. 15, 176, *March, 1887*.

405. The law does not prescribe that citizens or any other particular class of persons shall be the only competent bidders for government contracts or that aliens shall not be competent to bid. 49, 134, *September, 1891*.

406. On the question whether a clause be inserted in future government contracts which would prohibit the employment of aliens on government work, *held*, that there is no law which authorizes the insertion of such a provision in government contracts and that in the absence of such legislation the Secretary of War is without authority to require it. Card 2087, *February, 1896*.

#### APPEAL.

407. Appeal, in the sense in which the term is employed in the procedure of the civil courts, is unknown to the military law. While there is such a thing as a new trial—a proceeding, however, of the rarest occurrence (see § 1796, *post*),—a party legally sentenced by a competent court-martial has no right of appeal to a higher or other

<sup>1</sup> But see now the act of August 1, 1894, regulating enlistments in the army.

<sup>2</sup> Similarly held in *In re Bailey*, 2 Sawyer, 200.

tribunal, but, in the great majority of cases, can obtain relief only by application to the pardoning power, or—where the sentence has been executed—to Congress. I, 451, *December, 1862.*

#### APPOINTMENT.

408. An appointment (or commission) in order to take effect at all, must be *accepted*; but, when accepted, it takes effect in respect to rank as of and from its date, *i. e.*, the date on which it is completed by the signature of the appointing power, or that as and from which it purports in terms to be operative.<sup>1</sup> So *held* that certain assistant surgeons, whose appointments were noted in the Army Register as dating from the dates of acceptance, were entitled to have such dates changed to those of the appointments as actually made: that, while the date of acceptance is important in fixing the time from which, according to par. 1448, Army Regulations, properly commences the right to pay, it is the date of the execution of the appointment itself (or the prior date, where it is made in terms to relate back) which properly fixes the relative rank of the officer. XXXIX, 609, *July, 1878.*

409. Where to certain appointments made on the same date a particular order was given, with the intention of having the appointees rank in that order, but, subsequently, in sending the names to the Senate for confirmation, this order was by mistake reversed; *held*, after a confirmation of the appointees as thus sent, that this mistake and action could properly have no effect to change the relative rank of these officers as given and *fixed* by the original act of appointment. XLII, 254, *April, 1879.*

410. The Constitution (Art. II, Sec. 2, par. 2) provides that "Congress

<sup>1</sup>See RANK, secs. 2122 to 2131, inclusive, *post*. That an appointment is complete when made out and signed by the appointing power, and confers on the appointee the right to the office, see *Marbury v. Madison*, 1 Cranch, 137; *U. S. v. Bradley*, 10 Peters, 343; *U. S. v. Le Baron*, 19 How., 73; *Montgomery v. U. S.*, 5 Ct. Cls., 93. The office, however, cannot be considered as filled until the appointee has, in fact, accepted it. (Mechan on Public Officers, § 247; Am. & Eng. Encyc. of Law, 1st Ed., vol. 19, p. 437.) In the absence of a statute requiring adjustment on a different basis, pay begins with the date of acceptance. (Dig. Second Comp. Dec., vol. 3, §§ 892, 908, 943. See, also, *U. S. v. Flanders*, 112 U. S., 88; *U. S. v. Eaton*, 160 id., 331, 16 Opns. Atty. Gen., 38; 4 Comp. Dec., 486, 6 *id.*, 672.) The acceptance may be implied from the entry upon the discharge of the duties of the office (Am. & Eng. Encyc. of Law, 1st Ed., vol. 19, p. 437), and such acceptance may, it seems, be of an anticipated appointment so that it will take effect and pay begin when the appointment is completed prior to notice thereof. (5 Comp. Dec., 375.)

In cases of promotions in the Army pay is allowed by "memorial customs and practice" from dates of vacancies. "This is the time fixed by the Army Regulations of 1863, which have been recognized and sanctioned by Congress." Dig. Second Comp. Dec., vol. 3, §§ 867, 882. 7 Comp. Dec. (dated March 12, 1901. Par. 1200). A. R. of 1895 (1455 of 1901), provides: "A person appointed to the Army, or receiving an appointment to a new office therein is entitled to pay from date of acceptance only. In all cases of promotion an officer is entitled to pay from date of vacancy."

may by law vest the appointment of *inferior* officers in the President alone." So, where, in three several cases, Congress, by special legislation, authorized the President to "restore," or "reinstate," in his former rank and office, an officer (who had been—as expressed in the act, or indicated by the reports of committees, debates, &c.—in the opinion of Congress, erroneously or unjustly dismissed or mustered out), and to place him on the retired list in his previous grade, *held*, that such legislation empowered the President to reappoint the party without the concurrence of the Senate, and that the simple act of appointment by the President alone fully invested the party with the military office.<sup>1</sup> XLII, 178, 193, 246, 353, *February* and *July*, 1879.

411. The act of June 18, 1878, c. 263, s. 4, made eligible for appointment, as second lieutenants, non-commissioned officers of the "commands" of the "chiefs of the staff corps" of the army. *Held*, under this provision, that a non-commissioned officer on detached service as a clerk in the office of the Adjutant General was eligible to such appointment. XXXIX, 629, *August*, 1878. In a case of a principal musician, who was also a lance sergeant, recommended for appointment as second lieutenant under s. 3 of the act of June 18, 1878, c. 263, *held* that neither a principal musician nor a lance sergeant was a non-commissioned officer, and therefore that the soldier was not eligible to appointment under that statute. XLIII, 373, *July*, 1880.

412. *Held* that a special authority given by an act of Congress to the President to appoint a certain civilian to "any vacancy occurring in the grade of captain" in a certain regiment, empowered the President to appoint the party to the next such vacancy, without regard to the claim thereto, of the senior first lieutenant.<sup>2</sup> XXXIX, 525, *May* 1, 1878.

413. It was provided by the act of June 19, 1878, c. 263, s. 13, that no appointments or promotions should thereafter be made to fill any vacancy occurring in the army (except in certain inferior grades specified) until the report of a certain joint committee on the reform and reorganization of the army, constituted by the same act, and required to make report to Congress by January 1st, 1879, should "be made and acted upon by Congress." The report was made prior to the date fixed and was considered in various forms by both houses of Congress, but Congress finally adjourned, on March 4th, 1879, without specifically adopting or rejecting the report *as such*. *Held* that the Congress intended by the act was the Congress by which the act was passed,

<sup>1</sup> See this ruling confirmed by the Court of Claims in *Collins v. United States*, 14 Ct. Cls., 568. The Solicitor General, however, in an opinion of April 10, 1879 (16 Opins., 621), had previously held *contra*.

<sup>2</sup> See 14 Opins. At. Gen., 499.



viz., the Forty Fifth Congress; that as this Congress ceased to exist on the said March 4th, after which no action by it upon the report was possible, it might properly be said to have "acted upon" the same within the general terms of the act; and that accordingly, from and after the said date, the prohibition against the making of military appointments might be considered at an end. But *held* that the President, in thereafter appointing to vacancies which had in fact occurred during the period of prohibition fixed by this act, could not legally date back the appointments to take effect as of the dates of the vacancies, but that such appointments could take effect only on or after the said March 4th.<sup>1</sup> XLII, 197, *March, 1879*; XLIII, 85, *November, 1879*.

414. *Held* that the provision of sec. 6 of the act of March 3, 1869, prohibiting appointments and promotions in the medical and other staff corps did not apply to or prevent the advancement in rank of assistant surgeons from lieutenant to captain; the increased rank of these officers resulting by operation of law, after three years' service, under the Act of July 28, 1866 (Sec. 1168, Rev. Sts.), and no new appointment being required for the purpose.<sup>2</sup> XXXI, 220, 223, *March, 1871*.

415. *Held* that a civilian (in this case a late captain who had been made a civilian by the approval and execution of a sentence dismissing him from the army) could, under existing law, be appointed to the line of the army only in the grade of second lieutenant, in the absence of express authority from Congress. For his appointment to his former grade, so as to except his case from the operation of the rule of promotion by seniority, the authority of Congress would be necessary.<sup>3</sup> XXXVII, 363, *March, 1876*; XXXVIII, 159, *July, 1876*; XLIII, 130, *January, 1880*.

416. *Held* that an appointment of a person as an officer of the army with the view and purpose of at once placing him on the retired list, would not be within the appointing power of the Executive, independently of authority from Congress; appointments to military office by the President being in contemplation of law appointments for the active duties and service of the military life, which can properly be performed only by men physically and mentally qualified therefor. Congress, however, of course may, as it has done in several cases,<sup>4</sup> by a special enactment authorize the President to appoint an officer and thereupon place him on the retired list. XLIII, 130, *January, 1880*.

<sup>1</sup> The appointments were made according to this view, and were confirmed, after considerable debate, at the first session of the Forty-sixth Congress.

<sup>2</sup> See, to a similar effect, 16 Opins. At. Gen., 651.

<sup>3</sup> See 14 Opins. At. Gen., 2, 164, 499.

<sup>4</sup> See acts of June 21, 1876, c. 143; June 19, 1878, c. 330; Mch. 3, 1879, c. 175; Mch. 3, 1879, c. 291.



417. There can be no question as to the power of Congress to authorize the appointment of an officer with both rank and pay from a back date.<sup>1</sup> So the President (except where expressly prohibited by statute) may, with the concurrence of the Senate, appoint an officer with rank from an earlier date, though not, except by express authority of Congress, with back pay.<sup>2</sup> But where an appointment to a specific military office has been duly made and accepted and has taken effect, *held* that the appointing power, as to that office, is *exhausted*. The Executive may indeed correct an *error* (of fact) in the date of such appointment,<sup>3</sup> but—no such error existing—he can not re-make the same as of a different and earlier date, either by his own action or by means of a re-nomination to the Senate, for the purpose of redressing an injury or grievance claimed by the officer to have resulted from the date originally given to the appointment. For such would be a granting of *relief*, and relief of a sort which can be accorded only by Congress. XLIII, 208, *February, 1880*.

418. The authority to "appoint" regimental staff officers, conferred upon regimental commanders by the Army Regulations, is no part of the constitutional appointing power, but is merely an authority to select and detail. As such it may be regulated by orders from the War Department, where desirable to prevent its being so exercised as to prejudice the interests of the service. Thus it is competent for the Secretary of War to direct by general order that such appointments shall not be dated back so as to take effect as of dates prior to those on which they were actually made, as also that appointees shall not become entitled to the additional pay for a period prior to their entering upon their duties.<sup>4</sup> XLI, 609, *July, 1879*.

419. The function of regimental quartermaster is not an *office* but merely a *duty* attached to the office of a first lieutenant appointed to exercise it. The authority given to the commander of a regiment, by the Army Regulations, to "nominate the regimental quartermaster to the Secretary of War for appointment if approved," is simply an authority to recommend a first lieutenant for the position, and the Secretary, in making the appointment, does not exert any of the appointing power of the Constitution, but only a power of selection and detail. Under Art. II, Sec. 2, par. 2, of the Constitution, a head of an executive department cannot appoint to office without being empowered to do so by Congress. Thus, the appointment of a regi-

<sup>1</sup> 5 Opins. At. Gen., 101; 6 *id.*, 68, 74; 7 *id.*, 709, 712.

<sup>2</sup> 4 Opins. At. Gen., 318, 603, 608; 5 *id.*, 132; 8 *id.*, 223; *United States v. Vinton*, 2 Sumner, 290.

<sup>3</sup> See 3 Opins. At. Gen., 307.

<sup>4</sup> See the subsequent G. O. 73, Hdqrs. of Army, 1879, in accordance with this opinion.

regimental quartermaster being a mere detail, the Secretary of War is authorized at any time to withdraw or discontinue the appointment and service of a particular officer as regimental quartermaster, and to call upon the regimental commander to nominate another first lieutenant therefor. XLII, 567, *April, 1880*.

420. A regimental commander is not obliged by army regulations, to appoint to be sergeants or corporals of companies, the soldiers recommended to him for such appointments by the company commanders. He is to be regarded as vested with a discretion in the matter, and though in the great majority of instances he will properly appoint as recommended, he may, and should, decline to appoint where he believes the nominee to be an unfit person. XXVII, 159, *September, 1868*.

421. An enlisted man, beside being unmarried and not over 30 years of age, must have served honorably not less than two years, and be a citizen, to qualify him for examination and appointment as a commissioned officer. (Act July 30, 1892.) 57, 155, *December, 1892*. Under Sec. 2166, Rev. Sts., an alien (of 21 years of age) who has been honorably discharged as a soldier, may be naturalized without previous declaration of intention and after but one year's residence. But as the existing law contemplates that one applying for such examination shall be a soldier, such an alien, on being thus naturalized, would have to be reenlisted. Card 3360, *July, 1897*. The Belgian minister having applied for the discharge from our military service of a Belgian gentleman who had enlisted with a view to promotion and who desired to become naturalized accordingly — *advised* that considerations of international courtesy would justify the Government in consenting to his discharge and reenlistment (after naturalization) in order to enable him to qualify himself for examination under the act of 1892. 62, 186, *October, 1894*.

422. The act of July 30, 1892, relating to the promotion of enlisted men to the grade of second lieutenant, provides that all soldiers under thirty years of age, having certain qualifications named, may compete for promotion under the system of examination to be prescribed by the President to determine their fitness for promotion. The act further provides for an order of merit of those successfully passing the final examination, and that they shall then be appointed in that order to the grade of second lieutenant, but that this right to appointment may be taken away by sentence of a general court-martial. On the question whether the President had the power in prescribing the system of examination to provide by regulation that a competitor who has obtained a place in the order of merit, shall have and retain for one year only his right to appointment when reached in that order, *held*,

that such a regulation was a limitation upon the right given the competitor or candidate by statute, was not authorized by the statute and was therefore invalid.<sup>1</sup> Card 3305, *February, 1898*.

423. Sections 3 and 4 of the act of 1878, were expressly repealed by the act of June 30, 1892. The first act provided for a system of examination by which the persons mentioned therein could be recommended to the President for appointment as second lieutenants, while the second provides an arrangement for making a list of eligibles from which only, and in the order in which the names stand on the list, the President can make appointments of enlisted men to the grade of second lieutenant. Card 4044, *April, 1898*.

424. *Held*, that under sec. 3 of the Army Appropriation Act of June 18, 1878, the filling of vacancies in the army by the appointment of meritorious non-commissioned officers to the grade of second lieutenant before all the graduates of the Military Academy have been assigned, would be at variance with the law. Card 3305, *June, 1897*.

425. The act of July 30, 1892, relating to the appointment of enlisted men as second lieutenant specifically requires two years previous service in the army. This requirement is mandatory and cannot be waived. Card 2065, *February, 1896*.

426. After his discharge from the service a non-commissioned officer no longer belongs to that class of enlisted men from which, under the act of July 30, 1892, vacancies in the grade of second lieutenant may be filled after the appointment of the Military Academy graduates. Card 3577, *October, 1897*.

427. If an enlisted man, after having passed the final examination for appointment as second lieutenant under act of July 30, 1892, and before appointment, is, upon due examination by medical officers of the army found physically disqualified for such appointment, or an already existing physical disqualification is discovered or reported, the Secretary of War may and should withhold the appointment.<sup>2</sup> Card 3577, *October, 1897*.

428. *Held*, that when a soldier holding a "certificate of eligibility" under the act of July 30, 1892, either marries or ceases to be a soldier he is no longer eligible for appointment under the act. Card 4118, *May, 1898*.

429. Sec. 3 of the act of July 30, 1892 (G. O. 79, A. G. O. 1892), provides "that no more than two examinations shall be accorded to the same competitor." And par. 27, A. R. (30 of 1901), provides "that an applicant who twice fails in competitive examination to obtain a certificate of eligibility as candidate for promotion cannot again compete for

<sup>1</sup> To the same effect, see opinion of Attorney-General of April 7, 1898.

<sup>2</sup> See opinion of Attorney-General of June 16, 1898.

that position." *Held* that the regulation correctly interprets the statute as meaning the competitive mental examination. The physical examination required is merely preliminary to the mental, and a failure to pass it does not constitute an examination within the meaning of the statute. There must be two failures to pass the competitive mental examination to render the candidate ineligible for further examination. Card 9521, *January, 1901*.

430. A recess appointment is not continued by a new appointment and commission during a session of the Senate; the latter is a new and distinct appointment.<sup>1</sup> Card 2805, *December, 1896*.

431. *Held* that as the Volunteer Army Act of April 22, 1898, contains no express provision for the appointment by any one of the regimental (field and staff) officers of a volunteer regiment composed of companies taken from two or more States, the President may under section 2 of Article 2 of the Constitution, appoint them.<sup>2</sup> Card 4624, *July, 1898*.

432. *Held* that as there is no law authorizing the transfer of a volunteer officer as such to a lieutenantcy in the regular army, the words "civil life" as used in section 5 of the act of March 2, 1899, providing for the appointment of second lieutenants in the regular army, should be construed to include officers of the volunteer army; in other words the appointment of a volunteer officer as second lieutenant in the regular army would under this section be an appointment from civil life. Cards 6024, *March, 1899*; 6553, *June, 1899*.

433. Section 7 of the act of March 2, 1899, provides that "no person in civil life shall hereafter be appointed a judge-advocate, paymaster or chaplain \* \* \* who is more than forty-four years of age." The words "civil life" as here used should be given their usual signification and therefore would not include persons in the military service as officers of the volunteer army. In construing section 5 of this act as set forth in the preceding section it was necessary to depart from the ordinary rule that words are to be taken in their usual signification, to avoid the absurd conclusion that officers of the volunteer army were, by reason of being such, ineligible for appointment as

<sup>1</sup> 9 Wheaton, 720, 721; 2 Opins. At Gen., 336; 1 Fed. Rep. 104, 109; 20 Fed. Rep. 379, 382; Dig. Dec. 2d Comp., (1869), vol. 1, § 152, p. 22.

<sup>2</sup> If a volunteer regiment is made up of separate companies or battalions contributed by two or more States, the governor of each State would be entitled to appoint the officers of the companies or battalions by them respectively contributed in a body. He would not be entitled to appoint the regimental officers to which the regiment is entitled by reason of its organization in that form. The same would apply to a battalion. If a battalion is made up of companies contributed by two or more States, the governors respectively of each State would be entitled to appoint the officers of the companies, but the officers of the battalion as such would be appointed by the President of the United States. In all cases where appointments to such organizations are to be made by the President, the same law as to number and rank would apply that applies to regiments authorized by the laws and regulations applicable to the Regular Army. (Opin. At. Gen., July 20, 1898.)



second lieutenants in the regular army. But in construing section 7 of the act there is no such obstacle. Moreover, both of these statutory provisions affect the President's appointing power and should be construed most favorably to it. Such was the construction placed on section 5, *supra*, and such is the construction suggested for section 7. Before this legislation no restriction in the matter of the age of appointees for the offices of judge-advocates, paymasters, and chaplains was imposed on the appointing power, and legislation to that effect should not be construed as creating any further restriction than the actual language demands. *Held*, therefore, that a person holding a commission as major and paymaster in the volunteer army who is past the age of forty-four years is eligible for appointment as major and paymaster in the regular army. Card 6553, *June, 1899*.

#### APPROPRIATION.<sup>1</sup>

434. It is a familiar general principle adopted and acted upon in the executive departments that appropriations made in conformity with *estimates*, and based upon them, imply an authority to expend the appropriated funds for the articles designated in the estimates and a legislative sanction of the objects for which the appropriations were asked. 11, 666, *May, 1887*; 41, 105, *May, 1890*.

435. Estimates may be a legitimate means of construction of appropriation acts based on them.<sup>2</sup> But an appropriation cannot be construed as appropriating for a certain article specified in the *estimates*, unless it either names that article or designates a class of objects within which it may be fairly and reasonably embraced.<sup>3</sup> In the latter case it may be presumed that Congress had in view the particular article and intended to make provision for it. 54, 112, *June, 1892*.

436. An appropriation made for a particular fiscal year is available, for the payment of proper charges against it incurred during that year,<sup>4</sup> for a period of two years after the expiration of the fiscal year. It then lapses and is no longer available. 63, 337, *January, 1894*. Thus, where the annual Army Appropriation Act, of June 13, 1890, making appropriations for the fiscal year ending June 30, 1891, appropriated as usual a certain sum for "barracks, quarters and other buildings," *held* that, to have the benefit of this appropriation for the repair and reconstruction of the public buildings at Jefferson Barracks,

<sup>1</sup> As to appropriations by implication, see 4 Comp. Dec., 325, 6 *id.*, 514.

<sup>2</sup> See *Ohio v. Thomas*, 173 U. S., 276-282.

<sup>3</sup> See 6 Comp. Dec., 912.

<sup>4</sup> See 1 Comp. Dec., 170; 2 *id.*, 547, 615; 3 *id.*, 41, 623; 4 *id.*, 553; 5 *id.*, 318, 6 *id.*, 815, 898.



Mo., it would be necessary that such work should be contracted for within that fiscal year, and that the funds appropriated should be availed of and expended within two years from the date of expiration of the fiscal year.<sup>1</sup> 49, 320, *October, 1891*.

437. Section 3690, Revised Statutes, provides that "all balances of appropriations contained in the annual appropriation bills and made specifically for the service of a fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund."<sup>2</sup> This section, however, shall not apply to appropriations known as permanent or indefinite appropriations." *Held*, with respect to this section: (1) Where supplies are both ordered and delivered within the fiscal year or a contract is made providing for their delivery within the year, the appropriations for that year are chargeable therefor, unless it clearly appears that the amount was manifestly and largely in excess of the needs of the year, including in such needs the keeping of a reasonable stock on hand. (2) Where a contract is made within the fiscal year providing for deliveries within the year, the appropriation for that year would be chargeable therewith even if the actual deliveries were not made until after its close, subject to the limitation stated in (1). (3) Where a contract is made within a fiscal year, providing for delivery of supplies to begin in that year, and the deliveries are completed after its expiration, the appropriation for that year would be properly chargeable, if it appears that the supplies delivered after the expiration of the year were required to replace inroads made during the year on the "reasonable stock on hand." In such a case the supplies could be considered as "*for the service of that year*." (4) If a *non-perishable* article is needed for a given fiscal year, either for actual use or to keep a reasonable stock on hand, its purchase during that year should be charged to the appropriation for that year, even though its use may be continued for several years. (5) Where a contract for a building is made and construction begun within a fiscal year, the appropriation for that year would seem to be properly chargeable therewith, even though the construction is not completed until some time after its expiration. Card 8525, *June, 1900*.

<sup>1</sup> See Secs. 3679, 3690, 3691, R. S., and see, 5, act of June 20, 1874—18 Stat. L. 110; Digest Dec. Second Comp., Vol. 3, p. 31; Decisions of 1st Comptroller, p. 82 (1893-94). For a review of the laws and decisions relating to the covering into the Treasury of balances of appropriations not used, see Decisions of the Comptroller of the Treasury, Vol. 3, p. 623.

<sup>2</sup> "Congress intends that each annual appropriation should bear the burdens of the particular year for which it is granted, and that it should be for the proper use of that year, and no other." 6 Comp. Dec., 815, 819.

**438.** Money appropriated for the improvement of rivers and harbors is not available for the payment of damages suffered by individual citizens on account of injury to their property, caused by the negligence of the employees of the Government or the defective construction of a public work.<sup>1</sup> 54, 390, *July, 1892*.

**439.** The River and Harbor Appropriation Act of July 13, 1892, contained the provision: "Improving East River and Hellgate; removing obstructions"—a specified sum. *Held*, in view of Sec. 3678, Rev. Stat., that such appropriation was not legally available for the payment of a claim, interposed by certain tug-owners for personal services in assisting to put out a fire on a dredge used by the Government in the improvement.<sup>2</sup> 63, 386, *February, 1894*.

**440.** *Held* that the funds appropriated by Congress for the improvement of the Ohio River were not legally available for the removal of an *ice gorge* closing a part of the river opposite Cincinnati and threatening the destruction of floating property. 57, 293, *January, 1893*.

**441.** An appropriation act contained a simple appropriation—"for improving" a specified part of a river named; so much. *Held* that such appropriation was not legally available for the reimbursement of U. S. employees for losses of personal effects caused by the sinking, without their fault, of a vessel employed in the improvement. 44, 87, *November, 1890*.

**442.** *Held* that the expense of attending a congress of engineers in Paris, in July, 1869, incurred by an engineer officer detailed for the purpose as a representative of the Corps of Engineers of our Army, would clearly not be a legal charge against the appropriation for the improvement of rivers and harbors in that officer's "district." 55, 134, *August, 1862*.

**443.** Under an appropriation for the "improvement of the Yellowstone National Park," *held* that the Secretary of War would be authorized to purchase a bridge, the private property of a person who, before the park was reserved, had constructed the same over the Yellowstone River on one of the principal thoroughfares and where a bridge was indispensable; such bridge being in good condition and clearly an "improvement." 62, 15, *October, 1894*.

**444.** Under the appropriation in the army appropriation acts—"for expenses of courts martial and courts of inquiry, and compensation of witnesses," *held* that the legal fee of the proper official for a certified copy of a marriage certificate, necessary to be used in

<sup>1</sup> That the United States is not legally responsible for such claims, see § 784, *post*.

<sup>2</sup> This claim was also of the class of claims for *unappropriated* amounts, the allowance of which is beyond the authority of the head of an Executive Department. See § 769, *post*, and note.

evidence in a case on trial by court martial, was a proper charge against the appropriation. 19, 423, *October, 1887*. *Held* otherwise as to the fees of a U. S. marshal for serving subpoenas for the prosecution in such a case, there being no express authority for the employment of such official by a judge-advocate for such a purpose; but advised that the amount charged might be paid from the appropriation for contingencies of the army. LII, 399, *April, 1887*. *Held* that the appropriation under consideration referred to compensation of *civilian* witnesses only, and did not apply to retired officers of the army ordered to appear as witnesses before courts-martial; but that the latter are entitled in such cases to the authorized mileage and to enable them to obtain the same proper orders should be issued in each case. 28, 291, *November, 1888*.

445. *Held* that the appropriation for the recruiting service—"for expenses of recruiting and transportation of recruits"—was not available for the payment of *mileage* of officers for travel while on recruiting service, but that the same was chargeable to the general appropriation for the mileage and cost of transportation of officers. 41, 103, *May, 1890*.

446. *Held* that the appropriation for the current year—"for shelter, shooting galleries, ranges, repairs, and expenses incident thereto"—was intended for target practice with small arms, and would not cover the rental of a piece of ground for artillery practice, but that such rental, being of small amount (*i. e.*, for the occupation of the ground for a few days only), might properly be considered a legitimate charge against the appropriation for the contingencies of the army. 62, 209, *November, 1893*.

447. Where certain officers of the army were defendants in a cause in which the United States was interested, and their defence, before the U. S. court, had been undertaken by the Department of Justice, *held* that, while not entitled to military mileage, their necessary expenses in going to, attending and returning from, the court, constituted a legitimate charge against the standing appropriation "for defraying the expenses" of suits in which the United States is interested.<sup>1</sup> LI, 590, *March, 1887*.

448. *Held* that the appropriation made by the act of May 2, 1889, for the water supply of the District of Columbia, could not legally be resorted to for the defraying of a charge for the medical treatment of an employee injured on the work; nor could the same be legally paid

<sup>1</sup>The payment of the traveling expenses of these officers was subsequently—June 18, 1887—authorized, from the appropriation for contingencies of the army. As to future similar cases see opinion of Attorney General, published in Circular 3, A. G. O., 1887.

from the appropriation for contingent expenses of the army. 44, 358, *December, 1890.*

449. The employment by the month or otherwise of a civilian physician to treat civilian employes of the Government engaged on river and harbor improvements would not be a legal charge against the appropriation for said improvements.<sup>1</sup> Card 1696, *September, 1895.*

450. A specific sum was appropriated for a defined specific purpose—the “construction complete of a sewerage system” at Fort Monroe—and, upon proposals being invited for the work, the lowest bid was in excess of the amount appropriated. *Held* that the statute evidently contemplated the completion of the system with the appropriation made, the intention of Congress clearly being to limit the cost of the work to that amount, and that the appropriation could not therefore legally be availed of for the construction of a system the completion of which would require an additional appropriation. 55, 364, *September, 1892.* When a special appropriation is made for a certain object, it is held to be an expression by Congress as to the amount of public money which can legally be expended for that object. Cards 53, *July, 1894*; 2913, *February, 1897*; 3544, *September, 1897*; 3453, *February, 1898.*

451. The appropriation for army contingencies is available for defraying necessary expenses, arising in the current business of army administration, and not otherwise provided for. An amount to make good damages to private property done by the falling of ice from the roof of a public building under charge of the War Department would not be a legal expenditure from this appropriation. 52, 48, *February, 1892.* Nor can it be used to supplement a specific appropriation for a particular work or other express purpose which has been found to be inadequate. Thus where the sum of \$6,000 was appropriated (September, 1893) for repairs to the old Ford Theater Building, and this amount was found to be insufficient, *held*, that the appropriation for army contingencies could not be used to supply the deficiency.<sup>2</sup> Having made a specific appropriation for repairs to the building, Congress must be presumed to have thus fixed a limit to the amount of

<sup>1</sup> 1 Comp. Dec., 62, 181.

<sup>2</sup> That a specific appropriation is exclusive of the general appropriation, and the latter cannot be used to supplement the former, unless authorized by Congress, see 1 Comp. Dec., 10, 57, 126, 236, 317, 417, 559, 560; 3 *id.*, 70, 353; 4 *id.*, 24; 6 *id.*, 743. Such authority is given as to the Interior Department, 4 *id.*, 5. Where it is doubtful whether a particular item is properly payable from the appropriation for a particular object or from a general appropriation, the matter is within the discretion of the head of the Department having control of the appropriations. 5 *id.*, 855; and where two appropriations are applicable to the same object, neither specific so as to exclude the other, they are cumulative, and either or both may be used. 4 *id.*, 121.



public money to be available and expended therefor. 62, 74, *October, 1893*; Cards 52, *July, 1894*; 205, *September, 1894*.

452. The appropriation for contingencies of the army is only available for the payment of such expenses, not otherwise provided for, as are necessary, usual or appropriate in connection with the operations of the army,<sup>1</sup> and cannot therefore be used to provide mere gratuities. Thus *held*, that as the government was under no legal obligation to pay the burial expenses of a civilian employe in a brigade hospital, such expenses could not legally be paid from the said appropriation. Card 7030, *September, 1899*.

453. The payment of copyists employed in the bureaus of the War Department out of the appropriation for army contingencies would be an expenditure for clerical compensation and is therefore prohibited by sec. 3682, Rev. Sts. Card 1154, *March, 1897*.

454. *Held*, that expenses incurred in transporting Canadian half-breed Indians from Montana to Canada would not be a legal charge against the appropriation for contingencies of the army. Card 5816, *February, 1899*.

455. *Recommended*, in the absence of any appropriation specifically applicable to the subject, that the amount of the insurance prepaid, by the contractor in England, upon the transportation to this country of an Armstrong gun contracted for by the United States, be refunded out of the appropriation for the contingencies of the army. 53, 80, *April, 1894*.

456. The deficiency appropriation act of March 3, 1899, contained this provision: "For emergency fund to meet unforeseen contingencies constantly arising, to be expended in the discretion of the President, three million dollars." *Held*, that this fund was available for expenditure towards the relief of the sufferers from the recent cyclone in Porto Rico.<sup>2</sup> Card 6953, *August, 1899*.

457. A sum legally payable out of a specific appropriation cannot be transferred to the credit of another appropriation. 36, 205, *November, 1899*. But this rule does not affect the proper *disbursement* of the sum appropriated. Thus where, in the Military Academy Appropriation Act, a certain amount was appropriated for models of guns and car-

<sup>1</sup>The words "contingent expenses" as employed in acts making appropriations mean, such incidental, casual, and unforeseen expenses as are necessary, usual, or appropriate to the object for which the principal appropriation is made, and there is no discretion conferred upon heads of Departments to use such appropriations for other purposes. 1 Comp. Dec., 287; Vol., 151. Under sec. 3683, Rev. Sts., the expenditure from such appropriations must be authorized by the head of the Department prior to incurring the expenses. 1 Comp. Dec., 510; 2 *id.* 1. An appropriation will not be construed as for "contingent expenses" unless so designated. Vol., 7.

<sup>2</sup>Occurred to, by the Comptroller of the Treasury under date of Aug. 31, 1899. 6 Comp. Dec., 177.



riages, *held* that the Secretary of War was authorized to transfer this amount for disbursement to the disbursing officer at Watervliet Arsenal where the models were to be manufactured, instead of leaving the disbursement to the disbursing officer at West Point. 60, 498, *July, 1893*.

458. Where it was proposed to transfer to the Quartermaster Department of the Army five mules purchased from an appropriation for river and harbor improvements, *held*, that such a transfer would not be a sale and could legally be made.<sup>1</sup> Card 3679, *January, 1898*.

459. Where legitimate accounts were presented to the War Department which would properly be payable out of an appropriation which had been fully expended, *held* that the same should be transmitted to the Treasury Department as "claims to be certified to be due by the accounting officers under appropriations the balances of which have been exhausted or carried to the surplus fund, \* \* \* and certified to Congress," as indicated in s. 3, act of July 7, 1884, c. 334. They could then be appropriated for in a deficiency act and thus paid. 62, 389, *November, 1893*.

460. Where the payment of the extra-duty pay to enlisted men, authorized by Sec. 1287, Rev. Sts., was omitted to be appropriated for in a certain fiscal year, *advised* that the services of the men be accepted under the express understanding that their payment depended upon Congress, and that their rendition of the service would not give them any claim upon the United States, unless Congress should appropriate for such payment. LV, 43, *September, 1886*.

461. *Held* that the provision of the act of March 3, 1893, making appropriation for monuments and tablets at Gettysburg did not repeal or supersede the act of March 3, 1873, donating condemned cannon &c., to the Gettysburg Battlefield Memorial Association. 61, 94, *August, 1894*.

462. The appropriation in the Army Appropriation Act of February 27, 1893, for "regular supplies of the quartermaster department, consisting of \* \* \* fuel and lights for enlisted men, guards, hospitals, storehouses and offices, and for sale to officers" *held*, so far as concerns lights and officers, to include any such lights or material for lighting as may be saleable to officers, and therefore to be applicable for the production and furnishing of gas, to be paid for by officers at a cost covering expenses. This appropriation for "fuel and lights" is first found in the Army Appropriation Act of 1881, and, originating thus recently, may be deemed to contemplate gas as a material for lighting equally with the more primitive methods. 64, 470, *May, 1894*.

463. The appropriation act for the Military Academy for 1871,

<sup>1</sup>See para. 616, 671, A. R. 698, 753 of 1901, and 3 Comp. Dec., 602.

made an appropriation of one thousand dollars as salary of the librarian's assistant, "while the office is held by the present incumbent." After 1871 the words quoted were omitted from the annual appropriation. *Held*, that, by this omission the restriction was discontinued and that the salary could legally be paid to a person other than the incumbent in 1871, who had recently deceased. 64, 118, *March, 1894*.

464. In the act making appropriations for the support of the Army for the fiscal year ending June 30, 1884, it was provided "that civilian employes of the Army stationed at military posts may under regulations to be made by the Secretary of War, purchase necessary medical supplies prescribed by a medical officer of the Army at cost with ten per centum added." The next Army Appropriation Act omitted this provision, but it was held that the same, though in the form of a proviso, was in fact general and permanent legislation.<sup>1</sup> 4, 159, *August, 1884*.

465. The Sundry Civil Act of July 1, 1898, appropriated a specified amount for lighting 20 arc lights in the Executive Mansion Grounds and Monument Park 365 nights at not exceeding 25 cents per light per night, which amount should cover the entire cost of lighting and maintaining said lights. *Held*, that the cost of necessary excavations for and extension of underground conduits to carry the current for the new lights would be a proper charge against this appropriation. Card 4641, *July, 1898*.

466. No part of an appropriation which has been made for the erection of a public building can legally be used in the purchase of furniture therefor, except such in the nature of fixtures as may be considered a part of the building itself and necessary to complete it for the purposes stated in the appropriation act.<sup>2</sup> Card 3944, *March, 1899*.

467. There is no authority of law for the expenditure of money by the United States on a roadway over which it has no right of way or easement. Card 2722, *November, 1896*.

468. The expenditure of an unexpended balance of an appropriation not "made specifically for the service of any fiscal year" (Sec. 3690, Rev. Sts.) is not rendered illegal by the lapse of time. Card 4066, *April, 1898*.

469. On an application made to the Secretary of War by the commissioners of Sheridan County, Wyoming, for an appropriation from the transportation fund of the army, of \$2,000.00, to be expended by said county through the commissioners thereof, to assist individuals in the construction of a wagon road across the Big Horn range of

<sup>1</sup> See Army Appropriation Act for fiscal year ending June 30, 1866 (13 Stat., 497), in which sale of tobacco to enlisted men and sale of stores to officers on credit are similarly authorized, and 14 Opins. At. Gen., 681.

<sup>2</sup> See 3 Comp. Dec., 134.

mountains, it appearing that the road would facilitate military operations in that region—*held*, that a special act of Congress appropriating funds for this work would be necessary, the appropriations of the Quartermaster's Department not being available for the purpose. Card 26, *July, 1894*.

470. Property can not be leased by the Government unless there has been an appropriation to pay the rental; and where an existing appropriation has been "extended" by Congress such extension would authorize a lease only during the period of the extension. Card 195, *August, 1894*.

471. The act of Congress of March 3, 1897, making appropriations for fortifications, &c., contained an appropriation of \$75,000.00 "for construction of a riprap wall for protection of United States lands at Sandy Hook, New Jersey." *Held*, that under Sec. 355, Rev. Sts., the expenditure of this appropriation could not legally be made before jurisdiction over said lands had been ceded by the State of New Jersey to the United States. Card 3066, *April, 1897*.

472. Sec. 3678, R. S., prohibits the use of money for any purpose other than that for which it was appropriated. Card 3721, *November, 1897*. Thus *held* that the expense of fencing a tract of land, the property of the United States, intended for fortification purposes, would not be a legal charge against the appropriation for river and harbor improvements. Card 726, *January, 1895*. Also where a specified amount was appropriated for "shelling or otherwise improving to completion," a specified road, between two places named, *held*, that the appropriation could not legally be applied to the construction of an entirely different road from that referred to and contemplated by the act. Card 3635, *November, 1897*.

473. In the Army Appropriation Act of February 27, 1893, continued by joint resolution of June 29, 1894, under the head, army transportation, money was expressly appropriated for constructing roads and wharves. *Held*, therefore, that the expense of repairing a crib dock and approach thereto belonging to the Government on the Fort Wayne Military Reservation, and used for military purposes, would be a proper charge against the said appropriation for army transportation. Card 70, *July, 1894*.

474. The Army Appropriation Act, approved August 6, 1894, fixed the number of clerks and messengers to be employed in a number of given offices, appropriated for their payment and provided that they were to be employed and apportioned to the several headquarters and stations by the Secretary of War. The number was 125 clerks and 45 messengers. Two clerks in excess of the authorized number were

employed for a short time. *Held*, that the act appropriating salaries for the 125 clerks amounted to a provision of law that no more than that number should be employed on the work specified in the act, and hence prohibited the employment or payment of the two extra clerks. Card 295. *September, 1894.*

475. Where the United States owns and has exclusive jurisdiction over a military reservation, subject to a right of way through the same of a public highway—*held*, that the expense of repairing such highway would be a legal charge against the funds pertaining to the general appropriation for army transportation of the Quartermaster's Department, provided the repair would be useful for military purposes. Card 3683. *November, 1897.*

476. *Held*, that telegrams sent and received by those engaged in recruiting organizations of the volunteer army of the United States, and which related to such recruiting, are official and may be paid for as telegrams sent and received in carrying on such official business of the Government, out of the appropriation in the Quartermaster's Department made for that purpose, and at the rates fixed for other official telegrams. Card 4670. *July, 1898.*

477. *Held*, that telegrams containing applications for leaves of absence, for extension of same and inquiries as to whether they have been granted, independently of any regulation on the subject, are not "telegrams on official business" within the meaning of the act making an appropriation for payment of "cost of telegrams on official business," and can not therefore be paid for from that appropriation.<sup>1</sup> Card 6925. *September, 1899.*

478. *Held*, that the act of Congress making an appropriation for the "relief of the people of Alaska" and providing that the supplies should be purchased and the relief furnished under the direction of the War Department did not authorize the use of the appropriation to reimburse private parties for relief furnished by them prior to the passage of the

<sup>1</sup> Referring to this case the Comptroller under date of October 27, 1899, said: "6 Comp. Dec., 122." "It requires no argument to show that leaves are granted for the benefit of the persons and that any cost relating thereto should not be borne by the United States. I have to advise \* \* \* that said telegrams should not be paid for by the United States."

Where a Brigade Surgeon, U. S. A., in charge of a hospital at Philadelphia, Pennsylvania, sent certain telegrams with a view to obtaining leaves of absence for officers in said hospital who were convalescent to enable them to go to their homes and thus relieve the hospital of their care and enable it to retain accommodations for others of the sick who might be sent there for treatment, the Secretary of War, under date of November 17, 1899, said: "The sending of such telegrams under the circumstances is viewed as not only an official act performed in pursuance of duty but as one of the interest of the military service, and is not regarded as subject to the provisions of Par. 1209, A. R., which are held as applying to applications for personal leaves and therefore does not come within the scope of the opinion of the Comptroller of the Treasury and the Judge-Advocate General of the Army."



act.<sup>1</sup> Cards 6078, *March, 1899*; 7344, *November, 1899*; 7483, *January, 1900*.

**479.** By act of Congress approved July 8, 1898, \$200,000 was appropriated "to enable the Secretary of War, in his discretion, to cause to be transported to their homes the remains of officers and soldiers who die at military camps or who are killed in action or who die in the field at places outside of the limits of the United States." *Held*, that the appropriation could be used for providing metallic caskets and other expenses incident to disinterring the remains and preparing them for shipment as well as for transportation proper, as such expenses are necessary and proper to their transportation. But further *held*, that the act did not apply where the deceased officer or soldier died within the limits of the United States.<sup>2</sup> Card 4808, *August, 1898*.

**480.** Where the collectors of customs (army officers) under the military government in Porto Rico were required to transfer a portion of the funds to subsistence officers to be expended for the subsistence of the army, *held*, that the collection, transfer and disbursement of these funds were under the control of the military commander or military governor and did not form any part of an appropriation made by Congress for the support of the army. Such funds should not therefore be taken up on accounts current of disbursing officers in connection with funds from such appropriations. Card 5464, *December, 1898*.

**481.** Sec. 1136, Rev. Sts., provides that "permanent barracks or quarters and buildings and structures of a permanent nature shall not be constructed unless detailed estimates shall have been previously submitted to Congress, and approved by a special appropriation for the same, except when constructed by the troops; and no such structures, the cost of which shall exceed twenty thousand dollars, shall be erected unless by special authority of Congress." In practice this section has been construed to permit of the construction out of the annual appropriation for "barracks and quarters" of permanent buildings, at a cost not to exceed \$20,000, although no detailed estimates "have been previously submitted to Congress, and approved by a special appropriation for the same," and also to permit of the construction of more than one permanent building at a particular post for the same purpose, even though their aggregate cost should exceed \$20,000.00. In view of the apparently contradictory provisions of

<sup>1</sup>See 5 Comp. Dec. 257.

<sup>2</sup>See A. R., 162, as amended by G. O., 141, A. G. O., 1898, which provides for the cases of soldiers dying within the limits of the United States. See A. R. 189 of 1901.



the section, *advised* that the construction which it has received in practice be adhered to. Card 6985, *September, 1899*.

482. Money donated and turned over to the United States to be expended upon a public work would have to be appropriated by Congress to that work before it could be used thereon. Card 1662, *August, 1895*.

#### ARMY—EMPLOYMENT OF FOR CIVIL PURPOSES.<sup>1</sup>

483. Under Art. IV, Sec. 4, of the Constitution, the army may be employed to protect a State from "invasion" or "domestic violence," only by the order of the President, made "on application of the legislature, or of the executive when the legislature cannot be convened." A military commander, of whatever rank or command, can have no authority, except by the order thus made of the President, to furnish troops to a governor or other functionary of a State, to aid him in making arrests or establishing law and order. XXX, 125, *March, 1870*; XLI, 206, *April, 1878*.

484. The proviso of the Constitution—"when the legislature cannot be convened," may be said to mean when it is not in session, or cannot, by the State law, be assembled forthwith or in time to provide for the emergency. When it is in session, or can legally and at once be called together, it will not be lawful for the President to employ the army on the application merely of the governor. XXX, 172, *March, 1870*.

485. A military force employed according to Art. IV, Sec. 4, of the Constitution, is to remain under the direction and orders of the President as commander-in-chief and his military subordinates; it cannot be placed under the direct orders or exclusive disposition of the governor of the State. XXX, 172, *supra*; card 8383, *May, 1900*.

486. Though *dicta* are to be met with in the authorities looking to such a service as legal, it is clear that the military forces of the United States, cannot, as such, be permitted, in any event, to serve upon the *posse comitatus* of a *sheriff*, or other executive official whose function it is to execute the local laws of a State or Territory. XXXVI, 450, *May, 1875*; XXXIX, 458, 577, *March and June, 1878*.

487. It is provided in sec. 15 of the act of June 18, 1878, c. 263, that—  
"From and after the passage of this act it shall not be lawful to employ any part of the army of the United States as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in

<sup>1</sup> For a full discussion of this subject and citation of authorities, see "The Use of the Army in Aid of the Civil Power," by G. N. Lieber, Judge-Advocate General, U. S. Army, Appendix B, p. 759, *post*.

such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."<sup>1</sup> In view of this legislation, *held* as follows:

That whenever a marshal or deputy marshal was prevented from making due service of judicial process, for the arrest of persons or otherwise, by the forcible resistance or opposition of an unlawful combination or assemblage of persons, the President was *expressly authorized* by Sec. 5298, Rev. Sts.,<sup>2</sup> to employ such part of the army as he might deem necessary to secure the due service of such process and execute the laws. XXXIX, 665, *September, 1878*; XLIII, 80, *November, 1879*; 324, *May, 1880*.

That, notwithstanding the legislation of June 18, 1878, the President was authorized to employ the military to arrest and prevent persons engaging in introducing liquor into the Indian country contrary to law, as also to arrest persons being otherwise in the Indian country in violation of law,<sup>3</sup> or to make the arrest therein of Indians charged with the commission of crime; such employment being *expressly authorized* by Secs. 2150 and 2152, Rev. Sts. XLIII, 112, *December, 1879*.

That the President was authorized by sec. 2150, Rev. Sts., to remove by military force, after a reasonable notice to quit, certain persons commorant upon an Indian reservation contrary to the terms of a treaty between the United States and the tribe occupying the reservation, and

<sup>1</sup> As to what provisions of the Constitution and acts of Congress are excepted, see paragraphs 486-491, A. R. of 1895 (563-568 of 1901).

As U. S. marshals are not *expressly authorized* by any Act of Congress to *summon* the military to serve on a *poase comitatus* (this being authorized only indirectly and impliedly by the provision of the act of Sept. 24, 1789, incorporated in Sec. 787 of the Revised Statutes, 6 Opins. At. Gen., 460, 471; Letter of At. Gen. Evarts to the U. S. Marshal for the No. Dist. of Fla., At. Gen.'s Office, Aug. 20, 1868; General instructions to U. S. Marshals from At. Gen. Taft published in G. O. 96, Hdqrs. of Army, 1876), the army can not, under the existing law, legally act on the *poase comitatus* of a marshal or deputy marshal of the United States. See 16 Opins. At. Gen., 102 (Oct. 10, 1878); 17 *id.*, 242, 333; 19 *id.*, 293; 21 *id.*, 72.

While the object of the serving of U. S. troops on the *poase* of a U. S. Marshal (where legally authorized so to serve) is simply to assist and co-operate with him in the enforcement of the process committed to him for execution, and the commander of the detachment is to consider himself as acting in subordination to the civil officer (see At. Gen. Evarts's letter of instructions cited, *supra*), the troops employed are to be regarded as under the command of their military superiors, and directly responsible to the latter as on other occasions of the performance of military duty and service. See G. O. 96, A. G. O., 1876; also par. 490, A. R. of 1895 (567 of 1901).

<sup>2</sup> See Sec. 5300, Rev. Sts., as to proclamations by the President whenever in his judgment it becomes necessary to use the military forces under Secs. 5297, 5298, and 5299 or other sections of Title LXIX, R. S. As instances of such proclamations see Proclamation of Oct. 7, 1878, 20 Stat., 806; do of July 8 and 9, 1894, 28 Stat., 1249, 1250. See also the President's (Cleveland) reply to Gov. Algea, July 5, 1894—published in "The Use of the Army in Aid of the Civil Power," Lieber, Appendix B, *pass.*, page 781.

<sup>3</sup> But note that, in view of the provisions of Sec. 2151, Rev. Sts., an officer of the army who detains a person arrested under Sec. 2150 longer than five days before "conveying him to the civil authority" or subjects him when in arrest to unreasonably harsh treatment, renders himself liable to an action in damages for false imprisonment. *Bare Carr*, 3 Sawyer, 310; *Waters v. Campbell*, 5 *id.*, 17.

who therefore were there "in violation of law" in the sense of that section.<sup>1</sup> XXXVII, 266, *January, 1876*.

488. In all cases of civil disorders or domestic violence, it is the duty of the army to preserve an attitude of indifference and inaction till ordered to act by the President, by the authority of the Constitution or of Sec. 2150, 5297 or 5298, Rev. Sts., or other public statute. An officer or soldier may indeed interfere to arrest a person in the act of committing a crime, or to prevent a breach of the peace in his presence, but this he does as a citizen and not in his military capacity. (See TWENTY-FOURTH ARTICLE.) Any combined effort by the military, as such, to make arrests or otherwise prevent breaches of the peace or violations of law in civil cases, except by the order of the President, must necessarily be illegal. In a case of civil disturbance in violation of the laws of a State, a military commander cannot *volunteer* to intervene with his command without incurring a personal responsibility for his acts. In the absence of the requisite orders he may not even march or array his command for the purpose of exerting a moral effect or an effect *in terrorem*; such a demonstration indeed could only compromise the authority of the United States while insulting the sovereignty of the State. XXX, 125, *March, 1870*; XXXII, 241, *January, 1872*; XXXVI, 450, *May, 1875*; XLI, 206, *April, 1878*.

489. *Held* to be at least doubtful whether the authority of the President as Commander-in-chief could legally be extended to the ordering of an officer of the army upon the purely civil duty of instructing Indian youth, unless indeed such instruction was to be given by him as a professor of a college, &c., under Sec. 1225, Rev. Sts. Special duties of an exclusively civil character, where intended to be anything more than merely temporary, have in general been devolved upon military officers only by the authority of express legislation, as, for example, in the cases provided for by Secs. 1225, 2062, 2190, and 4687, Rev. Sts., in which authority has been given by Congress for the employment of officers of the army as professors, &c., of colleges, Indian agents, and assistants in taking the census<sup>2</sup> and on the coast survey. So, *advised*, that, if thought expedient to devolve upon military officers the function of the instruction of Indian youth, specific authority be obtained from Congress for the purpose.<sup>3</sup> XLI, 315, *April, 1879*.

<sup>1</sup>See 14 Opins. At. Gen., 451; 20 *id.*, 245; and note the proclamation of the President published in G. O. 16, Hdqrs. of Army, 1880, relating to the intrusion of unauthorized persons upon the "Indian Territory" and declaring that the army would be employed to effectuate their removal if necessary.

<sup>2</sup>See G. O. 30, Hdqrs. of Army, 1880.

<sup>3</sup>Congress was accordingly resorted to for authority in this instance, and by the Act of June 23, 1879, c. 35, §. 7, the Secretary of War was specially empowered "to detail an officer of the army not above the rank of captain for special duty with reference to Indian education." A detail was made accordingly—by S. O. 194, Hdqrs. of Army, Aug. 23, 1879.

490. *Held* that, in the execution of process of arrest under the act of March 3, 1885 (rendering Indians amenable to the criminal laws of the Territories), the military may, by direction of the President, legally be employed to aid the civil officials in such arrests, such employment being expressly authorized by Sec. 2152, Rev. Sts. LIII, 272, *April, 1887*.

491. The Industrial Training School for the Chiloecco Indians not being established "at a vacant military post or barracks set aside for its use by the Secretary of War," held that the Secretary would not be authorized to detail an officer of the army for duty there "in connection with Indian education," under the act of July 31, 1882, ch. 363. XLIX, 320, *September, 1885*.

492. There is not in the treaties with the Indians of the Indian Territory, or Secs. 2147, 2150, 2152, Rev. Sts., any express authority vested in the President to use the army in such territory for the apprehension of local robbers or thieves, etc., or for the protection of corporations or individuals from such robbers or other outlaws, except in so far as such offenders may be persons who are in, or are attempting to enter the Indian country "contrary to law," or are Indians charged with crime. (Sec. 2152, Rev. Sts.) In these cases they could be apprehended by the military forces, but only by virtue of and conformably to the statutes cited, and not (unless they be Indians) because they are train robbers or other offenders against the local peace or laws.<sup>1</sup> Cards 542, *October, 1894*; 5354, *November, 1898*.

493. Under act of May 17, 1884, a civil government, consisting of an executive and a judicial branch, was established for Alaska, and the general laws of Oregon were made the laws of the territory. On the question whether the army could be used to enforce the law in that territory, *held*, that if the United States marshal should ask for military assistance to enable him to execute a process which he is unlawfully prevented from executing, it could legally be given him by the President. The act of June 18, 1878, does not preclude such action, because, as held by the United States Supreme Court, the President has by virtue of his Constitutional powers to take care that the laws are faithfully executed and as commander-in-chief of the army the power to use force when necessary in the execution of the laws of the United States.<sup>2</sup> Card 3119, *April, 1897*.

<sup>1</sup> As to the use of U. S. troops in case of insurrection or riot endangering the public property of the United States, or in case of attempted or threatened interruption of the U. S. mails or other equivalent emergency, see A. R., 489 (566 of 1901).

<sup>2</sup> See *In re Neagle*, 135 U. S. 1, and authorities cited.



## ARMY REGULATIONS.

494. Army regulations proper are executive or administrative rules and directions as distinguished from statutes.<sup>1</sup> A regulation in conflict with an existing act of Congress can have no legal effect; if, subsequently to the issue of a regulation, an act is passed with which it conflicts, it becomes at once imperative.<sup>2</sup> XXXVIII, 255, *August, 1876*; 641, *June, 1877*; 43, 422, *November, 1890*; 49, 276, *September, 1891*; 60, 471, *July, 1893*; 65, 187, *June, 1894*. Army regulations, like statutes, are not to be given a retroactive effect unless their language clearly requires it. 28, 260, *November, 1888*.

495. An authority which can legally be vested by legislation only, cannot of course be conferred by an executive regulation. Thus *held* that the expenditure of the proceeds of the sale of articles manufactured by the prisoners at the Military Prison, such proceeds being public funds, could not properly be the subject of an army regulation. XLII, 24, *October, 1878*.

496. *Held* that the provision of s. 37, c. 299, act of July 28, 1866,

<sup>1</sup> Army regulations are not to be confounded with the "rules for the government and regulation of the land (and naval) forces," which Congress is empowered to make, by Sec. 8, Art. I of the Constitution; these being, of course, *statutory* rules. The use in this section of the word "regulation," the fact that the published Army Regulations contain sundry statutory provisions not distinguished from the mass of regulations proper, and embrace also some subjects which seem scarcely within the scope of executive direction or military orders but to pertain rather to the province of the statute law; and the further fact that the Army Regulations as a body received a special recognition—see § 496, *post*, in the act of July 28, 1866—these circumstances have contributed to confuse regulations with statutes much to the embarrassment of the student of military law. Regulations proper, unlike articles of war, which are statutes, are simply orders and directions made and published to the army by the President, either as Commander-in-Chief, for the purposes of the exercise of command over the army, or as Executive, for the purposes of the execution of powers vested in him by law.

<sup>2</sup> As illustrating the distinction between statutes and regulations, and the principle that regulations can have force only so far as they are not inconsistent with the statute law, see *United States v. Webster*, Daves, 38, 56-59, and 2 Ware, 46, 54-60; *Booby v. United States*, 1 Wood. & Minor, 150, 164; *McCall's Case*, 5 Phila. 259; *In re Griner*, 16 Wise, 447; *Magruder v. United States*, Devereux (Ct. Cls.), 148; 1 Opins. At Gen. 469, 4 *id.*, 56-63, 223, 225-7, 6 *id.*, 10, 211, 215, 357, 365; 8 *id.*, 335, 343; 11 *id.*, 251, 254; O'Brien, 31.

As to the inferior force and obligation of the British Army Regulations as compared with the Mutiny Act (and Articles of War thereby authorized), see Samuel, 193-197. Clode (Mil. & Mar. Law, p. 55) illustrates the nature of these Regulations in noting that originally, "Each Colonel had his own Standing Orders—no General Regulations being in existence—for the discipline and exercise of his regiment."

That regulations promulgated through the Secretary of War are to be "received as the acts of the Executive," see *United States v. Eliason*, 16 Peters, 291, 301; *United States v. Webster*, Daves, 38, 59; *United States v. Freeman*, 1 Wood. & Minor, 45, 54-1. *Lockington's Case*, Brightly, 288; *McCall's Case*, 5 Philad., 289; *In matter of Spangler*, 11 Mich., 298, 322; in connection with other authorities noted under SECRETARY OF WAR.

See also, for an exhaustive discussion of this subject and citation of authorities, "Remarks on the Army Regulations and Executive Regulations in General," by G. Norman Lieber, Judge-Advocate General, U. S. Army, Appendix A, p. 703, *post*.



which, in directing the Secretary of War to prepare and report to Congress at its next session a new set of regulations, added, "the existing regulations to remain in force until Congress shall have acted on said report," meant merely that the same should remain in force *as regulations*; it did not communicate to them the quality or effect of *statutes*. XXXIII, 666, *January, 1873*; XXXVII, 417, *March, 1876*; XXXIX, 235, *October, 1877*.

This enactment was but temporary, and was not incorporated in any form in the Revised Statutes. (It expired at the end of the 2d session of the 39th Congress, no code of regulations having been reported to that Congress by the Secretary of War as required by the act.) Meanwhile the regulations in force in July, 1866, have been very considerably modified and added to.<sup>1</sup> Thus there is now no existing statutory sanction—such as that of Sec. 1547, Rev. Sts., in regard to the regulations of the navy<sup>2</sup>—for the Army Regulations as a whole. No such sanction, however, or recognition, is *necessary* to give effect to regulations proper.<sup>3</sup> XXXIX, 235, *October, 1877*.

497. A breach of an army regulation, imposing a duty upon an officer or soldier, is in general chargeable as "conduct to the prejudice of good order and military discipline," and punishable under Art. 62. XXXIX, 283, *November, 1877*.

498. Par. 731, A. R. (1889), forbidding officers "to give or take receipts in blank for public money or property," &c., is sound in principle, and no sufficient reasons are perceived why exceptions to this rule should be authorized in cases of officers' pay accounts. 58, 426, *March, 1893*.

499. Army regulations may be divided into several classes: (1) Those which have received the sanction or confirmation of Congress, (2) those that are made pursuant to and in execution of a statute, and (3) those made by the President as commander-in-chief of the army and as executive and not made in supplement to a statute.<sup>4</sup> Regulations of the first class can not be altered, nor can exceptions to them be made by executive authority unless the regulations themselves

<sup>1</sup> The opinion expressed by the Attorney General (14 Opins., 104, 173—January, 1873) that by the act of 1866 "the authority to modify" the then existing army regulations, "previously possessed by the Executive," under the act of April 24, 1810, "would seem to have been taken away,"—was apparently not concurred in by the Secretary of War, repeated modifications of these regulations having been published in orders since (as well as before) the date of this opinion. In *United States v. Eubank*, 16 Peters, 296, 301, the Supreme Court, referring to the general power of the Executive to institute army regulations, observes:—"The power to establish implies, necessarily, the power to modify. " " " or create anew."

<sup>2</sup> This section is as follows:—"The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 11, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy subject to alterations adopted in the same manner."

<sup>3</sup> See first note under this Title.

<sup>4</sup> See Lieber on Regulations, cited in note 2 to § 494, *ante*.

provide for it. Card 2074, *March, 1896*. Regulations of the second class—those made pursuant to or in execution of a statute—may, unless prohibited by the statute, be modified by the executive authority, but until this is done they are binding as well on the authority that made them as on others. Thus, *held* that the regulations relating to the examination of enlisted men for commissions under act of Congress of July 30, 1892, were of this class, and that therefore the requirement respecting physical qualifications, having been prescribed pursuant to an act of Congress, was as binding as if incorporated in the act itself<sup>1</sup> and could not legally be waived in a particular case. Cards 1819, *November, 1896*; 2074, *supra*; 3219, *May, 1897*. With reference to the third class, the large body of regulations emanating from and depending solely on the authority of the President as commander-in-chief, it has sometimes been claimed that the same rule should be applied that is applied to regulations made pursuant to a statute. This has not, however, been done in practice, and should not be done for the reason that it would be an unnecessary, embarrassing and perhaps unconstitutional limitation upon the authority of the President as commander-in-chief. To exempt from compliance with a particular regulation of this class in an exceptional case would seem to be a lawful exercise of that authority. Thus *held* that the Secretary of War could, where the interests of the government demanded it, dispense with the bond required of contractors by A. R., 559 (628 of 1901). Card 2074, *March, 1896*.

500. There is a large mass of matters over which the Executive would have jurisdiction if Congress, with its superior jurisdiction (under the constitutional power to raise armies and to make rules for the government and regulation of the land and naval forces) had not occupied the field. In all such cases, to the extent that Congress regulates the subject, the power of the Executive to act in regard to it is taken away. Thus Congress, by Sec. 1102, Rev. Sts., prescribed that each cavalry regiment shall consist of twelve troops. To "skeletonize" some of these troops, that is, to discontinue them for a time, would be practically to change the statutory organization, and whether this can be done by Executive order, in the absence of statutory authority, is open to serious doubt. Card 3606, *October, 1897*.

501. There is no statutory authority for making a regulation placing civilian employees of the government on the same footing as discharged soldiers with regard to rations while under treatment in hospital, but neither is there statutory authority for the regulation in regard to discharged soldiers. The best that can be said of such reg-

<sup>1</sup>See U. S. v. Barrows, 1 Abbott (U. S.), 351.

ulations, like the orders of the War Department for issue of rations to sufferers from flood and famine, is that they are founded on a kind of necessity. Undoubtedly they should be authorized by statute. Card 9491, *December, 1900*.

## ARREST—MILITARY.

**502.** An officer may be put in arrest by a verbal or written order or communication from an authorized superior, advising him that he is placed in arrest or will consider himself in arrest, or in terms to that effect; the reason for the arrest need not be specified. At the same time he is usually required to surrender his sword, though this formality may be dispensed with. But an arrest, though an almost invariable, is not an essential preliminary to a military trial; to give the court jurisdiction it is not necessary that the accused should have been arrested; it is sufficient if he voluntarily, or in obedience to an order directing him to do so, appears and submits himself to trial. So, neither the fact that an accused has not been formally arrested, or arrested at all, nor the fact that, having been once arrested and released from arrest, he has not been re-arrested before trial, can be pleaded in bar of trial or constitute any ground of exception to the validity of the proceedings or sentence. II, 77, *March, 1863*; XVII, 419, *October, 1865*; XIX, 419, *February, 1866*; XXIX, 470, *November, 1869*; XXX, 164, *March, 1870*; XXXV, 142, *January, 1874*. An officer is in no case entitled to demand to be arrested. XVII, 419, *supra*.

**503.** Except in the class of cases indicated in Art. 24, only "commanding officers" can place commissioned officers in arrest. (See A. R. 221 of 1863; 998 of 1901.) The commanding officer thus authorized is the commander of the regiment, separate company, detachment, post, department, &c., in which the officer is serving. XXVI, 642, *July, 1868*. Where a company is included in a post command, the commander of the post, rather than the company commander, is the proper officer to make the arrest of a subaltern of the company. XXIX, 304, *October, 1869*.

**504.** It is clearly to be inferred from the Army Regulations that unless other limits are specially assigned him, an officer in arrest must confine himself to his quarters. It is generally understood indeed that he can go to the mess-house or other place of necessary resort. It is not unusual, however, for the commander, in the order of arrest, to state certain limits within which the officer is to be restricted, and, except in aggravated cases, these are ordinarily the limits of the post where he is stationed or held. V, 434, *December, 1863*.

505. The *status* of being in arrest is inconsistent with the performing of military duty. II, 77, *March, 1863*. Placing an arrested officer or soldier on duty terminates his arrest. XXVI, 114, *October, 1867*. Releasing a soldier from arrest and requiring him to perform military duty, after his trial and while he is awaiting the promulgation of his sentence, can be justified only by an extraordinary exigency of the service. VII, 234, *February, 1864*.

506. The fact that a soldier has been held in arrest for an unreasonably protracted period before trial, or while awaiting the promulgation of his sentence, is a good ground for a mitigation of his punishment. XXXV, 504, *July, 1874*.

507. An officer is not privileged from arrest by virtue of being at the time a member of a general court martial.<sup>1</sup> VII, 320, *March, 1864*.

508. An officer under arrest is not disqualified to prefer charges. V, 345, *November, 1863*; XVI, 68, *May, 1865*.

509. The imposition of an arrest affects in no manner the right of an officer or soldier to receive the pay and allowances of his rank. IX, 64, *May, 1864*; XIII, 386, *February, 1865*; XXIII, 18, *June, 1866*. Except in a case of a deserter (see A. R. 129 of 1895; 140 of 1901) no legal inhibition exists to paying a soldier while in arrest—either before trial or while awaiting sentence—his regular pay and emoluments. XXX, 419, *June, 1870*.

510. The principle of the common law by which a witness is protected from arrest<sup>2</sup> should in general be applied to military cases. If it can well be avoided, an arrest should certainly not be imposed upon an officer or soldier while attending a court martial as a witness. But such an arrest would constitute an irregularity only, and would not affect the validity of the proceedings of a trial to which the party thus arrested was subsequently subjected. XXXIX, 12, *May, 1876*.

511. A soldier while confined in arrest should not be fettered or ironed except where such extreme means are necessary to restrain him from violence, or there is good reason to believe that he will attempt an escape and he cannot otherwise be securely held. XXX, 483, *July, 1870*.

512. As to the work which may be required of soldiers in arrest, par. 999, A. R., has been amended and interpreted by Cires., Nos. 3 and 7 A. G. O., 1890. Under the regulation as thus established (A. R. 907 of 1895; 1005 of 1901), soldiers in confinement awaiting action on the proceedings of their trials are assimilated to those awaiting trial, and both classes may, at the discretion of the commanding officer, be employed,

<sup>1</sup> But an arrest of an officer while actually engaged upon court-martial duty should, if practicable, be avoided.

<sup>2</sup> 1 Greenl. Ev., § 316; Smythe v. Banks, 4 Dallas, 329.



separately from prisoners undergoing sentence, upon such labor as is habitually required of soldiers. More severe or other labor would not be authorized, nor would labor with a police party consisting in whole or in part of men under sentence however slight their sentence might be.<sup>1</sup> 41, 26, *May, 1890*; 48, 91, *April, 1891*. A soldier in arrest in quarters may be required to do cleaning or police work about his quarters which otherwise other soldiers would have to do for him. 49, 329, *October, 1891*.

513. The military authorities are not empowered to make forcible entrance into a private dwelling to effect an arrest of a soldier.<sup>2</sup> Card 395, *October, 1894*.

#### ARREST—BY THE CIVIL AUTHORITIES.

514. A soldier (other than a deserter—under Art. 48) cannot legally be required to make good to the United States a period of time during which he was held in arrest or on trial by the civil authorities on account of a civil offence.<sup>3</sup> XXII, 570, *January, 1867*; XXIV, 279, *February, 1867*.

515. A soldier, arrested by the civil authorities and released on bail to await trial, may, on returning to his station, be required to perform the usual military duty appropriate to his rank (XXIV, 279, *supra*), and while on such duty, his pay status is unaffected. Card 1717, *September, 1895*.

516. A soldier who has committed a crime which has properly subjected him to arrest and punishment by the civil authorities cannot justly be allowed pay and allowances for the period during which he has been detained in arrest. If it should be made to appear that his arrest and detention were unwarranted on the part of the authorities, either by reason of his innocence of the crime charged, or that his arrest, because of some statutory provision, was unauthorized, he would, it is held, be entitled to his pay and allowances. His acquittal upon a trial should be accepted by the Government as conclusive in his behalf that the civil proceedings against him were without legal justification. XXV, 559, *May, 1868*; Cards 2010, *February, 1896*; 7544, *January, 1900*.

517. Par. 1314, A. R. (1464 of 1901), declares that "Officers and enlisted men in arrest and confinement by the civil authorities will receive no pay for the time of such absence; if released without trial, or after trial and acquittal, their right to pay for the time of such

<sup>1</sup> See G. O. 44, Div. Atlantic, 1889.

<sup>2</sup> See Circ. 12, A. G. O., 1894.

<sup>3</sup> See § 375, *infra*, and note.



absence is restored." *Held* that this regulation did not apply to a case of a soldier thus arrested and confined when duly absent from duty on furlough. A soldier absent on a furlough, which has not been recalled, is not withdrawn from duty by such arrest, and his pay status is not thereby changed. 56, 253, *October, 1892*. Where an Indian scout was arrested and detained by the civil authorities for nearly a year, and then discharged without trial *held* that he was entitled to his pay for the period of detention.<sup>1</sup> 32, 78, *April, 1889*.

518. There is no statute (like Sec. 1237, Rev. Sts., relating to enlisted men) by which a commissioned officer is exempted from arrest for debt, where such arrest is otherwise legally authorized.<sup>2</sup> XXXIII, 8, *March, 1872*.

#### ARREST OF CIVILIANS BY THE MILITARY.

519. A civilian may legally be arrested without a warrant as well by a military person as by any citizen where he commits a felony, or crime in breach of the public peace, in such person's presence; or where, a felony having been committed, such person has probable cause for believing that the party arrested is the felon. In a case of such an arrest at a military post, the arresting officer or soldier should use no unnecessary violence, should disclose his official character and inform the party of the cause of his arrest, and should deliver him as soon as reasonably practicable to a civil official authorized to hold and bring him before a court or magistrate for disposition. 41, 457, *July, 1890*.

520. The Superintendent of the Military Academy is not in general authorized to arrest and confine in the guard house a civilian for a mere breach of the police regulations of the Post or Academy. His proper remedy is to have the offender removed as soon as practicable, and without unnecessary force, from the reservation. 41, 457, *supra*.

521. The State of Iowa has ceded to the United States exclusive jurisdiction over the portion of the Rock Island Arsenal Bridge and approaches, situate within that State. In a case of a crime or offence against the United States committed by a civilian on such portion, *held* that the commanding officer at the Arsenal would be authorized to arrest the offender and cause him to be brought before a U. S. commissioner or other official specified in Sec. 1014, R. S. He could not properly

<sup>1</sup> Digest Dec. Second Comp., Vol. 2, § 831.

<sup>2</sup> See *Moses v. Mellett*, 3 Strohn., 210; *McCarthy v. Lowther*, 3 Kelly, 397; *Ex parte Harlan*, 39 Ala., 565. But note in this connection the general principle of public policy by which public servants are exempted from arrest *en route* (though not on criminal process while on public duty). *United States v. Kirby*, 4 Wallace, 482; *Coxson v. Doland*, 2 Daly, 66.

hold the party and notify the commissioner to send for him, but must himself have him taken before the commissioner. Where indeed no such official is accessible at the time, the commanding officer may hold the offender in the guard house, but only for such interval as may be necessary. 39, 51, *February, 1890.*

## ARTIFICIAL LIMB.

522. The description, "hired men of the land forces," employed in the act of Feb. 27, 1877, amending Sec. 4787, Rev. Sts., may properly be construed to include the mechanics and laborers employed at arsenals by the authority of the provisions of Title XVII of the Revised Statutes. XXXIX, 316, *November, 1877.*

523. *Held* that the effect of Sec. 4787, Rev. Sts., as amended by the act of March 3, 1891, was as follows: 1. All persons entitled to be furnished by the War Department with artificial limbs or apparatus for resection, in whose cases three or more years (and less than five years) had, on March 3, 1891, fully elapsed since the date of their last legal receipt of a limb, &c., became entitled, on said March 3, 1891, to receive at once a new limb, as of the end of the third year from such receipt, and further to receive another new limb at the end of three years from the completion of said third year, and so on. 2. All persons who had received a limb, &c., on March 3, 1888, or on any subsequent date prior to the date of the act of March 3, 1891, became entitled to a new limb on March 3, 1891, or other date three years succeeding such receipt, and again on March 3, 1894, or at the end of a further three years, and so on. 3. The act of 1891, being prospective in terms, cannot be construed as operating retrospectively or as authorizing a revision of former quinquennial receipts or money payments as their equivalents. 4. There is nothing in the amending act of 1891 to repeal, or affect the operation of, the provisions of Sec. 4788 or 4790, Rev. Sts., in regard to payments of money in lieu of delivery of limbs. These provisions are held clearly to apply to triennial rights equally and in the same manner as they applied to quinquennial.<sup>1</sup> 46, 58, *March, 1891.*

524. *Held* that the act of August 15, 1876, authorizing the Surgeon General of the Army to prescribe regulations under which persons shall receive artificial limbs, &c., referred only to regulations auxiliary to the act and designed to give it effect, and did not empower him to divest persons of the right of prosecuting claims for the same. XLIX, 225, *July, 1885.*

<sup>1</sup> Compare 20 Opins. At. Gen., 83.

**ASSISTANT SURGEON.**

525. It is a peculiarity in the *status* of assistant surgeons (under Sec. 1168, Rev. Sts.) that these are the only officers in our army (except lieutenants of Engineers and Ordnance—see Sec. 1207, R. S.) in whose case promotion to a higher grade results by operation of law from mere duration of service and independently of any action by the appointing power. XLIII, 208, *February, 1880*.

526. *Held* that a person appointed under sec. 17 of the act of July 28, 1866, fixing the military peace establishment an assistant surgeon with the rank of captain— to which rank he was entitled by length of service according to the act— was entitled to rank as a captain in the medical department and in the army from the date of his appointment, and as such to have precedence and priority in service, and on the Army Register, over all assistant surgeons appointed captain after himself, though they may have been appointed assistant surgeons with the rank of first lieutenants before he was so appointed with the rank of captain; and, further, that he was entitled on courts-martial, boards, &c., to rank any captain of the army whose appointment as such was of more recent date than his own.<sup>1</sup> XXXIX, 491, 508, *March, 1878*.

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**B.****BAIL.**

527. No court-martial, military commander, or other military authority is empowered to accept bail for the appearance of an arrested party or to release a prisoner on bail. Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case.<sup>2</sup> IX, 260, *June, 1864*; XXI, 258, *March, 1866*.

**BOARD OF INVESTIGATION.**

528. A board of officers convened to investigate—obtain, or hear and examine, evidence—and report, can, in the absence of specific statutory authority, exercise none of the peculiar legal functions either of a court-martial or a court of inquiry. II, 340, *May, 1863*; XXI,

<sup>1</sup>See, to a similar general effect, opinions of the Solicitor General of June 8 and July 2, 1878 (16 Opins. At. Gen. 56, 165).

<sup>2</sup>The act of July, 1864, c. 253, s. 7—which authorized a judge or commissioner of a U. S. district court to admit to bail a contractor or inspector, amenable to trial by court-martial under the then existing law, and arrested with a view to trial thereby—is no longer operative.

235, *April, 1866*; XXVI, 492, *March, 1868*; XXXII, 3, *May, 1871*; XLI, 263, *June, 1878*. Its members cannot be sworn; it cannot swear witnesses;<sup>1</sup> civilian witnesses cannot be compelled to appear before it; nor are the witnesses who appear and testify legally entitled to any compensation for attendance or travel. XI, 672, *April, 1865*; XXI, 335, *supra*; XXVI, 492, *supra*. Such a board cannot *try*, nor can it sentence. XI, 672, *supra*; XXXII, 3, *supra*. There is properly no "accused" party required or entitled to appear before it as before a court-martial or court of inquiry. II, 340, *supra*. It is not restricted by law as to the period of its sittings, nor is it affected by any statute of limitations. XXVI, 493, *March, 1868*. Its members (though in this, indeed, it does not differ from a court of inquiry) may present two or more reports where they cannot concur in one. XLI, 207, *April, 1878*.

529. As a *court of inquiry* cannot be ordered in a case of a *civilian*, a body of officers convened to inquire into and report upon the facts of the case of an officer who has been legally dismissed from the service is a mere board of investigation, and can exercise none of the special powers of a court martial or court of inquiry. XLI, 263, *June, 1878*.

530. A clerk of the War Department applied for a board to investigate charges against him made by another clerk. *Advised* that such a board would not be a body recognized by law, and would be without judicial power and incapable of being itself sworn or of administering oaths to witnesses; that it would not be desirable to resort to such an extra-judicial tribunal where the ordinary courts could more effectually inquire and afford redress. 32, 252, *May, 1889*.

#### BOARD OF SURVEY.

531. A board of survey is not a *court*, and can not legally exercise the powers expressly vested by statute in courts martial or courts of inquiry. XXXIV, 306, *June, 1873*. It is no part of the province of a board of survey to convict of crime. Where such a board, in fixing upon an officer a pecuniary responsibility for the loss of certain subsistence stores, expressed incidentally the opinion that the same had been stolen by a certain soldier, *held* that this opinion could not operate as a finding of theft, or constitute authority for the stopping against the pay of the soldier of the value of the stores. XLII, 605, *April, 1880*.

532. There is no statute or regulation authorizing the swearing of a board of survey or its members, nor indeed is it necessary or suitable

<sup>1</sup> See § 183, Rev. Stat., as amended March 2, 1901, note 1, p. 502, *post*.

that such a body, not being a court, should be specially sworn. A board of survey, moreover, has no legal capacity to swear persons attending before it as witnesses; nor is it within the province of an executive order to authorize such a board to administer an oath either to itself or to a witness.<sup>1</sup> V, 590, *January, 1864*; XXXIII, 548, 561, *December, 1872*; XXXIV, 305, *June, 1873*.

593. A board of survey, though it may not swear witnesses, may receive and file with its report affidavits of persons cognizant of facts under investigation. V, 590, *January, 1864*.

### BOND.

#### Of Disbursing Officer,<sup>2</sup> and Generally.

594. The bond should of course be executed by *all* the parties—obligor and sureties. XXXVII, 573, *May, 1876*. It has been held by the U. S. Supreme Court<sup>3</sup> that an instrument in the form of an official bond, though without seals, may be good as a contract at common law. To avoid, however, any questions that might arise from the absence of a seal, *advised* that formal seals "of wax or other adhesive substance," be in all cases required to be affixed by the subscribing parties.<sup>4</sup> XXVI, 471, *February, 1868*; XXXIV, 141, 142, *February, 1873*; XXXVII, 573, *May, 1876*; XXXVIII, 101, *June 1876*.

595. The obligation of each surety must be for the whole amount of the penalty; the regulation requiring that the sureties shall be jointly and severally bound for the whole amount of the bond. So, where the penalty in a quartermaster's joint and several official bond was \$10,000, and the sureties, in executing the same, assumed to be bound only in the sum of \$5,000 each, the words "for five thousand dollars" being written under each signature—*held* that the instrument was contradictory, did not conform to the regulations, and should not be accepted. XXVI, 327, *December, 1867*. And similarly *held* in a

<sup>1</sup> See opinion of Judge Advocate General published in full in G. O. 48, War Dept., 1873, also par. 712, A. R. (795 of 1901).

As to the procedure of Boards of Survey, action on their reports, &c., see G. O. 179 of 1898.

<sup>2</sup> Here may be noted the opinion of the Attorney General (16 Opins., 38) that the giving of bond is not necessary to entitle persons appointed to office in the army requiring the disbursement of money, to begin to receive pay, but that they are entitled, like other officers, to be paid upon the acceptance of their appointments, according to par. 1346, Army Regulations (1863), whether they have at that time furnished their bonds or not.

<sup>3</sup> *United States v. Linn*, 15 Peters, 290. Where an official bond offered by the principal without seals was returned to him to have the seals put on, and was brought back by him with the seals attached, the consent of the sureties thereto will be presumed in action on the bond, unless the contrary appears. *Moses v. U. S.*, 166 U. S., 571.

<sup>4</sup> See the requirement to this effect subsequently published in Circular, Hdqrs. of Army, of June 11, 1869; and see A. R., 571-578 (650-657 of 1901).



case of a bond with a penalty of \$40,000, where the sureties wrote opposite their signatures, respectively, "for \$35,000," "for \$5,000." Sureties cannot qualify their obligation by thus limiting their personal liabilities.<sup>1</sup> XXXIV, 183, *March, 1873*; Cards 1974, *January, 1896*; 2895, *January, 1897*.

536. There is no statute or regulation prohibiting an officer of the army from acting as a surety on the official bond of another officer. Such a relation, however, is not one to be favored. XXXIV, 164, *March, 1873*; XXXVIII, 659, *July, 1877*.

537. The regulations contemplate plural sureties on bonds of disbursing officers. A justification of a surety, however, is no part of the bond (XXVI, 327, *December, 1867*; XXXVIII, 418, *January 1877*), and as the object of the justification is to satisfy the Secretary of War that the sureties are good for double the penalty, the Secretary, where amply satisfied that one certain person offered or executing as surety is pecuniarily sufficient for such amount, would be authorized to accept him (on his properly justifying) as sole surety, and to waive any further surety or sureties with the instrument. A subordinate of course can have no such authority. In view, however, of the terms of the regulation and of the practice under it, this authority would of course most rarely be exercised in cases of disbursing officers' bonds. XXXVIII, 418, *supra*; XLI, 169, *April, 1868*.

538. Par. 572, A. R. (651 of 1901), prescribes that non-corporate sureties to bonds given by disbursing officers will be bound jointly and severally for the whole amount expressed therein and must satisfy the Secretary of War that they are worth jointly double such amount, each surety making affidavit that he is worth that sum over and above his debts and liabilities. But where the aggregate of the amounts in which the sureties justify equals or exceeds double the amount of the bond, the objection that one or more of them individually justified in less than that sum may be and is in practice waived by the War Department. Cards 873, *September, 1895*; *December, 1898*; 875, *January, 1895*, *January, 1899*; 1502, *July, 1895*; 1763, *October, 1895*; 2129, *March, 1896*; 2212, *April, 1896*; 3227, *May, 1897*; 3261, *June, 1897*, *January, 1898*; 3327, *July, 1897*; 4554, *July, 1898*.

539. The certificate as to sufficiency of non-corporate sureties should state, as required by army regulations that they are known to him—the official making the certificate—and that to the best of his knowledge and belief each is pecuniarily worth over and above all his debts and liabilities the sum stated in his affidavit of justification. Card 1670, *August, 1893*. The certificate is not required of a corporate surety. Card 284, *September, 1898*.

<sup>1</sup>See Murfree on Official Bonds, § 251.

540. Of two or more sureties to an official bond, each, according to the regulation, should justify separately; a justification in joint form is irregular and improper. XXXIII, 273, *August, 1872*; XXXVIII, 101, *June, 1876*. An affidavit of justification should properly be expressed in the first person, not in the third. XXXVII, 567, *May, 1876*. The sureties should personally sign each his own separate affidavit: an affidavit signed only by the notary or other official administering the oath is irregular. XXXIV, 147, 271, 337, *February and June, 1874*. Where the affidavit has been taken and executed, it is not regular for the obligor, even with the assent of the surety, to modify it in a material particular—as, for example, in the amount stated; where there is error, the proper course is for the surety to justify anew. XXXIV, 147, *supra*.

541. Section 1191, Rev. Sts., requires bonds only of certain disbursing officers specifically named. In the absence of any express provision of law, prescribing that bonds shall be furnished by other disbursing officers, the President, in his discretion, and for the better security of the public funds, may, through the head of the proper Department, require such bonds to be furnished.<sup>1</sup> 51, 446, *January, 1892*.

542. A bond given by a disbursing officer of the army (or any bond required by the War Department) wherein the Secretary of War is made the obligee, is in incorrect form. The obligee should be 'The United States of America.' 32, 131, *May, 1889*.

543. A bond should of course be dated, but the omission of the date will not affect the validity of the instrument, as the true date of execution can be proved *aliunde*, in the event of a suit on the bond.<sup>2</sup> 63, 387, *February, 1894*; cards 3511, *September, 1897*; 2687, *November, 1897*; 4279, *June, 1898*.

544. The seal of both obligor and sureties must be a formal one, of wax, wafer, or other adhesive substance. A mere scroll made with the pen is not accepted by the War Department. 54, 305, *July, 1892*; 63, 322, *January, 1894*; 64, 276, *March, 1894*; 65, 190, 406, 414, *June and September, 1894*; Cards 771 and 893, *January, 1895*; 2038, *February, 1896*; 2260, *May, 1896*. Where a corporation is the obligor, its corporate seal should be impressed on the bond if it has one. 65, 190,

<sup>1</sup> Bonds may be required by the Government from officers appointed to places of trust, though there is no statutory authority to take such bonds, and they will be valid as common-law obligations. In a bond with sureties, given by an officer of the Government, it is sufficient to make the bond valid as a common-law obligation that it is voluntarily given and that the office and the duties assigned to the officer and covered by the bond are duly authorized by law. U. S. v. Tugsey, 5 Pet., 115; U. S. v. Bradley, 10 id., 343, 380; U. S. v. Rogers, 28 Fed. Rep., 607; 6 Opina. At. Gen., 24.

<sup>2</sup> Murfree on Official Bonds, § 6.

409, 412, 414, *June to September, 1894*. But the fact that a corporation has not adopted a corporate seal will not affect the validity of its execution of a bond in which it is principal or surety, provided some form of seal be added to its signature. A corporation may make and use any seal in its discretion in the same manner as a private individual. L, 525, *July, 1886*.

545. Where all the subscribing witnesses have not witnessed all the signatures, it should be indicated on the bond by what witnesses the several signatures were witnessed. 37, 146, *December, 1889*.

546. Where a corporation is principal in a bond given to the United States, its full legal corporate name should be expressed. Thus where the laws of the State in which such a corporation was created required that the name of a corporation should always include the name of the city or county in which it was formed, and a corporation obligor had been incorporated as "The \* \* \* Company of Baltimore City," held that the bond was incomplete unless this addition was set forth, and the instrument executed accordingly. 58, 147, *February, 1891*.

547. Where a corporation is named as principal in a bond, its corporate name and seal (if it has one) should be affixed by the officer having authority to do so. LV, 686, *June, 1888*.

548. Obligations incurred by sureties are usually considered *debts of law* merely, and, as a rule, are paid only when enforced by law.<sup>1</sup> A bond, therefore, should not be accepted where suit cannot be successfully brought upon it against the sureties, whose contract, on the face of the instrument, must thus be clearly valid and binding. 56, 412, *November, 1892*.

549. A bond cannot be extended beyond the period of the original obligation so as to continue to bind the sureties, without their consent. XXX, 270, *April, 1870*. Nor can an expired bond be revived so as to bind the sureties without their consent. XXXI, 135, *January, 1871*. The Secretary of War (or President) has no power to release the sureties in an official bond from their liability to the United States.<sup>2</sup> XLI, 169, *April, 1878*; Card 1989, *January, 1896*. A neglect by the Government to institute suit on a bond does not discharge the sureties; *laches* not being in such cases imputable to the United States.<sup>3</sup> XXX, 270, *supra*.

550. The law of the place at which a contract is made governs as to its interpretation, except where the contract is to be performed elsewhere, in which case the law that governs in this respect is the law of the place of performance. An official bond, made to the United

<sup>1</sup> Murfree on Official Bonds, § 253.

<sup>2</sup> 7 Opins. At Gen., 62.

<sup>3</sup> U. S. v. Kirkpatrick, 9 Wheaton, 720.

States, wherever actually signed, is—as has been held by the Supreme Court<sup>1</sup>—a contract made and to be performed at Washington; and by the laws of the District of Columbia the contract of a married woman as surety is not binding. LII, 662, *October, 1887*. Moreover, it is not the practice of the War Department to accept a *feme covert* as a surety, and before a female surety will be accepted she is required to make oath that she is single in addition to justifying as required of other sureties. 64, 335, *April, 1894*; Cards 1019, *February, 1895*; 1262, *April, 1895*; 2204, *April, 1896*; 2360, *June, 1896*; 2990, *March, 1897*; 4623, *July, 1898*.

551. The affidavit of justification of a surety should be dated, so that it may appear when he was worth the amount specified. 30, 233, *February, 1889*. The names of the sureties in the justifications should be identical with those inserted in the body of the bond. Their names should not be omitted to be recited in the bond with the name of the principal. 64, 327, *April, 1894*.

552. A captain of the Commissary Department having given bond in a penalty of \$12,000, one of his sureties deceased. Par. 678, A. R. (572 of 1895; 651 of 1901), prescribes that the sureties to bonds given by disbursing officers shall be bound jointly and severally. The officer offered a new bond with one surety in a penalty of \$3,000. *Held* that such security would not be legally sufficient, but that a new joint and several bond in the penalty of \$12,000 would be required. 62, 351, *November, 1893*.

553. The affidavit of justification should be taken before some officer, like a notary public, having authority to administer oaths for general purposes and whose official character is authenticated by his seal.<sup>2</sup> 38, 412, *February, 1890*; 61, 395, *September, 1893*; 63, 117, *January, 1894*; 64, 157, 223, *March, 1894*; 65, 192, *June, 1894*. But as the justification is no part of the bond, and the administration of the oath by an official not competent to administer it does not affect the validity of the bond, the irregularity of the justification, where there is nothing to show that the oath was not taken in good faith by the surety, may be waived by the Secretary of War, and in practice it is now (May, 1893) waived, and the bond accepted if otherwise valid. 59, 498, *May, 1893*; 62, 367, *November, 1893*; Cards 28, *February, 1895*; 78, *July, 1894*; 372, *September, 1894*.

554. One of two (or several) sureties cannot withdraw independently from his obligation; and if allowed to do so by the obligee, the other surety (or sureties) will be released as to him. 37, 267, *December, 1889*.

<sup>1</sup> *Cox and Duck v. U. S.*, 6 Peters, 172, *Duncan v. U. S.*, 7 Peters, 435.

<sup>2</sup> Under section 19 of act of Congress of May 28, 1896 (29 Stats., 184), United States commissioners and all clerks of United States courts are authorized to administer oaths generally. (3 Comp. Dec., 65.)



But the Secretary of War is not empowered to release the sureties on a disbursing officer's bond. Card 667, *November, 1894*.

555. If after the execution of a bond a material change be made in the name or description of the principal, by erasure, interlineation, or otherwise, without the assent of the sureties or a surety, even though such change be made to correct a mistake, the surety or sureties not consenting will be released. In a case of such an alteration, *recommended* that a new bond be required. 35, 283, *September, 1889*; 57, 41, *December, 1892*; 58, 400, *March, 1893*. Similarly held, where the name of one of two sureties was erased and a new surety was substituted without the consent of the remaining surety, and *recommended* that the written assent of the latter to the erasure and substitution be obtained.<sup>1</sup> Card 1262, *May, 1895*.

556. The giving of a new bond by a disbursing officer—both the old and the new bonds being conditioned to become void if he should “henceforth during his holding and remaining in said office carefully discharge the duties” of said office, *i. e.*, the office of commissary of subsistence with the rank of Major—would operate to divide the responsibility as to future transactions between the old and the new sureties but it would not release the old sureties.<sup>2</sup> Cards 667 and 674, *November, 1894*; 733, *December, 1894*.

557. The official bond of a disbursing officer being in terms limited to the office he held at the time he gave it, becomes inoperative upon the promotion of such officer to a higher grade. He thus enters upon a new office and a new bond is required. The old bond remains, however, a valid obligation to cover any defaults which may subsequently be found to have occurred between the dates of its execution and the date of the officer's promotion. Card 1999, *June, 1896*.

558. Where certain disbursing officers commissaries of subsistence—were promoted during a recess of the Senate, received their letters of appointment, accepted and qualified thereunder, *held*, that by so doing they ceased to hold their old offices and became invested with the new offices (the terms of which were limited to the end of the next session of Congress), and that therefore under Sec. 1191, Rev. Sts., and A. R. 571 (650 of 1901), new bonds should be given. And further

<sup>1</sup> Brandt on Suretyship and Guaranty, second edition, §§ 380, 381, 385.

<sup>2</sup> See Digest Dec. Second Comp., Vol. 3, § 1356; American and English Ency. of Law, Vol. 24, p. 877; 5 Comp. Dec., 918.

The form of official bond authorized by the Secretary of War, Dec. 14, 1895, was conditioned that the officer should at all times “henceforth during his holding and remaining in said office, until a new official bond in his case shall be approved by the Secretary of War, carefully,” &c. (Card 1769); and the form authorized Dec. 31, 1900, is conditioned that if the officer “shall and do at all times during his holding and remaining in said office, from and including the date of approval of this bond by the Secretary of War, henceforth until the date of approval by the Secretary of War of a new official bond in his case, carefully,” &c. (Card 1482.)



*held*, that after the appointment, confirmation and commission of these officers new bonds would again be necessary.<sup>1</sup> Card 3689, *November, 1897*.

559. Where an officer of the line was appointed captain and commissary of subsistence during a recess of the Senate, *held*, that in view of the provisions of Sec. 1191, Rev. Sts., and A. R. 571, he should furnish the bond required before entering upon his duties under such appointment whether or not he had resigned his line commission. Card 2775, *November, 1896*.

560. An officer of the subsistence department (regular establishment) was appointed chief commissary with rank of lieutenant colonel in the volunteer army and gave the prescribed bond. While serving in the latter capacity he was promoted in the subsistence department of the regular establishment. *Held*, that it was not necessary to require of him a bond on account of such promotion until it was proposed to place him on duty in the office resulting therefrom. Card 4341, *July, 1898*.

#### BOND— Of Contractor or Bidder.

561. The general rule that bonds given to the United States should be under formal seal, applies with particular force to contractors' bonds.<sup>2</sup> XXVIII, 680, *June, 1869*.

562. Where a contractor offered a bond, subscribed, as sureties, by his two daughters, whose ages, as well as pecuniary relations to the obligor, were not known or stated, *advised* that to accept such a bond would be a bad precedent. XXXIX, 518, *April, 1878*.

563. A bond for the faithful performance of a contract will not cover material modifications thereof, in the form of a supplemental agreement or otherwise, unless the sureties formally assent to the same. Card 1244, *April, 1895*. And recommended that such assent be obtained. Cards 858, *January, 1895*; 966, *February, 1895*; 2093, *March, 1896*; 2705, *October, 1896*; 3462, *August, 1897*.

564. A bond was executed on a certain date, and it was recited therein that the principal had on a *subsequent* date entered into the contract for the due performance of which the bond was given. The fact that the bond was executed before the contract was, is immaterial, but the recital is a part of the means of identifying the bond and should not be contradictory. Recommended in the particular case that to

<sup>1</sup>U. S. v. Kirkpatrick, 9 Wheat., 720; 24 Opms. At. Gen., 336 4 *id.*, 30. But see, now, the new form of bond, the condition of which covers both offices, until the approval of a new bond (Card 10166, April, 1901).

<sup>2</sup>A regulation to this effect was prescribed in G. O. 10, Hdqrs. of Army, 1879—republished and amended in G. O. 72 of 1879 and 40 of 1880. And see the same orders for general regulations in regard to bonds of contractors and bidders; also paragraphs 515-578, A. R. of 1895 (593-657 of 1901).

avoid in the event of a suit on the bond the necessity of resorting to outside evidence to identify the contract, a new bond be required, the latter to refer to the contract as one which *will be* entered into. Cards 2765, *November, 1896*; 3053, *April, 1897*; 3164, *April, 1897*; 3640, *November, 1897*.

565. Where the sureties to the bond of a contractor who had failed to perform his contract applied to be discharged from their obligation on the ground that they had been induced to enter into the bond by false representations made to them by the contractor, *held* that the Secretary of War had no authority, upon such or other ground, to release sureties who had become legally liable to the United States.<sup>1</sup> XXXVII, 275, *January, 1876*.

566. A contractor for "personal services" is not in general required to give a bond. XXXVIII, 236, *August, 1876*.

567. *Held*, in view of the provision on the subject of the act of April 10, 1878, it was proper to require that bidders for contracts, from whom bonds were required, should properly bind themselves not to withdraw their bids within sixty days from the date of the opening of the bids. In the great majority of cases, indeed, bids will be required to be kept open but for a brief period, since the contract will generally be awarded at once or in a few days. Cases, however, may occur where, owing to questions raised as to the legality or regularity of bids, the competency of bidders, &c., a considerable delay may be incurred before the decision of the proper superior can be obtained or the difficulty be otherwise removed. It was no doubt for cases of this nature that the provision in regard to time was intended to provide. XXXIX, 628, *August, 1878*.

568. Under the act of March 3, 1883, c. 120, a bidder whose bid has been accepted, is required, in accordance with the terms of his guaranty, upon notice to him of the acceptance, to enter into contract and furnish bond for the proper fulfillment of its stipulations; but if such bond should not be given, and a contract should be entered into with some other person, such contract is not required, by the statute, to be accompanied by a bond. 60, 285, *July, 1893*.

569. The purpose of a bidder's guaranty is to furnish sufficient security that the bidder will, if his bid be accepted, enter into contract as prescribed. But the direct object is to enable the government to collect the difference between the bidder's bid and the amount the government would have to pay some one else for the supplies or work in case the bidder should not enter into contract according to his bid. The guaranty cannot be used to force him to enter into his contract;

<sup>1</sup> See 7 Opins. At. Gen., 62; and compare § 920, *post*.

but it is valuable and essential in the event of a suit to recover such difference. It should therefore be as formal and legally sufficient as a contractor's bond, and prepared with a view to serving as a basis for a legal claim by suit if necessary. 56, 412, *November, 1892*. There is no statute requiring such a guaranty, but under the act of March 3, 1883 (22 Stat., 488), the Secretary of War may require one. Card 9061, *October, 1900*.

570. The giving of bonds to secure the performance of contracts made for furnishing supplies, doing work, &c., for the War Department is not required by statute, but is a subject of administrative regulation.<sup>1</sup> So, where the amount involved in a contract for commissary stores was small, *advised* that the Commissary General be authorized to approve the contract without a bond. 16, 167, *April, 1887*. So, *advised* that the Secretary of War was empowered to dispense with bonds to secure the performance of contracts for furnishing meals to recruiting parties and recruits; he being indeed authorized to dispense at discretion with all contractors' bonds, where such are not specifically required.<sup>2</sup> 65, 233, *June, 1894*.

571. A bond to secure the performance of a contract is valid to secure the performance of any such modifications of the stipulations as are authorized by the terms of the contract itself, but will not cover modifications not thus authorized and which substantially make of the stipulations a new contract. 54, 7, 162, *May and June, 1892*.

572. Where a contract of lease was secured by bond and the lessee applied for a material delay in making payment of the rent, *held* that to grant such application would discharge the sureties unless they gave their assent to the delay, and *recommended* that the same be not acceded to without their consent to the arrangement.<sup>3</sup> LXI, 136, *May, 1888*.

573. There can be no legal authority, after a contract has been completed, for assigning the bond to creditors of the contractor (whom he owes for materials furnished him) to enable them to sue him upon it in the name of the United States.<sup>4</sup> 61, 16, *August, 1893*.

574. *Held* that a member of Congress may legally be accepted as surety on a contractor's bond to secure the fulfillment of a contract with the United States, his acting as such not being precluded by the provisions of either Sec. 3739 or 3742, Rev. Sts. XLIX, 377, *October, 1885*.

<sup>1</sup> The act of Aug. 13, 1894 (28 Stat., 278), directs that bonds shall be required with formal contracts for the construction of, or repairs upon, public buildings and public works, and that such bond shall contain a provision that "the contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract."

<sup>2</sup> See par. 559, A. R. 658 of 1901, as to the cases in which such bonds may be waived.

<sup>3</sup> Murtree, *Official Bonds*, § 319.

<sup>4</sup> But see the recent legislation of Aug. 13, 1894, cited in note to § 948, *post*.

## BOND—Of College, &amp;c., as required by Sec. 1225, Rev. Sts.

**575.** A bond executed in his official capacity by the president or other officer of an incorporated college or university, to secure arms, &c., issued under this section, cannot properly be accepted as binding the corporation without evidence that, by the act of incorporation or otherwise, such officer is legally empowered to act for and bind the institution. *XLI, 490, February, 1879; 647, August, 1879; XLIII, 70, October, 1879; 275, 294, April, 1880.*

**576.** The obligor and sureties should be bound without condition or reservation. Where a bond offered by a college contained a provision to the effect that to satisfy any liability incurred thereunder, recourse should be had to the property of the college before the property of the sureties was resorted to, *advised* that such bond be not accepted by the Secretary of War. *XXXVIII, 340, October, 1876.*

**577.** No form for the bond being prescribed in the statute, the Secretary of War may, if he deems the security ample, accept a bond with *one* surety, or he may even accept the bond of the corporation without sureties. In general, however, it will be safer to require sureties; such a requirement being also in accordance with the general rule governing bonds given to the United States. Sureties to bonds given by colleges should in general be required to justify in the usual manner. *XXXIX, 312, November, 1877.*

**578.** Though bonds in which the corporation controlling the institution is principal have usually been tendered under the statute, the same are not essential. The bond of an individual as principal—the president or other officer of the institution or other person in a private capacity—may properly be accepted if the security is deemed sufficient. *XLII, 598, April, 1880.*

**579.** The bond offered by a college, &c., pursuant to Sec. 1225, Rev. Sts., must be executed by the proper obligor and legal principal. If executed by a corporation as such, the name as signed must be the corporate name, *i. e.*, the same as that given in the articles of incorporation expressed in full. *42, 113, July, 1890; 62, 460, December, 1893; 63, 117, January, 1894; 65, 38, May, 1894.* Where the corporation, as created by the legislature, is a body of persons, as "Trustees," or "Board of Trustees," or "Regents," &c., the bond must be executed in the corporate name of this body by some one duly authorized thereby, and not in the name of the "college" or "university," the latter being merely an institution of learning or *property*, having no legal existence as a person. *29, 461, January, 1889; 30, 304, February, 1889; 48, 226, July, 1891; 49, 158, September, 1891; 58, 7, February, 1893; Cards 28, July, 1894; 2038, February,*



1896, and *August, 1899*. The name of the corporation, as it appears in the body of the bond and in the execution, should be the same. 62, 122, *October, 1893*. If the name is impressed on the *seal*, it should agree with that of the execution, though if the latter be correct, a variation in the seal will be immaterial. 31, 300, *April, 1889*.

580. The bond of a corporation must be signed for it by the officer of the corporation or some other person authorized to do so. If the corporation consists of a certain body of persons, or if such a body be specifically designated in the articles as empowered to authorize such acts as the execution of bonds for the corporation, the authority can not be delegated to other persons. Thus where, under the articles, the power is vested in a board of trustees, it would not be legal for such board to delegate the authority for executing the bond to an executive committee of the board. 29, 307, *January, 1889*; 39, 475, *March, 1890*; 56, 275, 308, *November, 1892*.

581. Where the articles of incorporation do not recognize such a body as an "Executive Committee" of the trustees, regents, &c., as empowered to act for the corporation, but simply devolve the management and control of the corporation upon a board of trustees, &c., a bond executed or authorized to be executed by such a committee will not be accepted as sufficient. In such a case it is the board which should authorize the execution of the obligation. 64, 370, *April, 1894*; 65, 38, 48, 102, *May, 1894*; card 3704, *February, 1898*. Where the articles of incorporation declared that the corporation should consist of and be controlled by certain trustees, but recognized an executive committee, in providing that such committee should, under the direction of the board of trustees, have a "general supervision of the affairs of the college and the property of the corporation," *held* that such words were not sufficient to empower the executive committee to bind the corporation in so important a matter as the execution of a bond under Sec. 1223, Rev. Sts. 64, 274, *March, 1894*. The act of incorporation provided for an executive committee whose duties should be prescribed by the by-laws of the board of regents. Such by-laws authorized the committee "to transact all such business as may from time to time be required by the board." *Held* that a bond executed pursuant to resolution of the committee, without any specific authority or requirement by the board being shown, could not be accepted, but that, if the board could not readily be convened, a personal bond of some individual, with sureties, should be substituted. 64, 327, *April, 1894*; Card 2687, *October, 1896*.

So, where the charter of incorporation of a college vested the "full control of the affairs of the college" in a board of trustees, and the board, by vote, devolved upon an executive committee power to "act



for the trustees," *held* that—even if this delegation were legal—such indefinite action, while authorizing the committee to transact ordinary business, was not sufficient to empower it to exercise the special discretion involved in the execution of a sealed obligation binding the corporation to the United States. 65, 484, *May, 1894*.

Where the applicant for the issue to it of arms, &c., under Sec. 1225, Rev. Sts.—an "Agricultural and Military College"—was not a corporation but a branch or "department" of the State university, a corporation, by which it was governed, *held* that, not being a legal person, it had not the capacity to enter into a bond, but that the bond should be in the name of the corporation and its execution should be authorized by the board of trustees of the university, or—if they could not be assembled for the purpose—that an individual bond should be furnished. 64, 110, *March, 1894*.

582. Where a board of trustees controlling a corporation, passed a resolution empowering the president of the board "to negotiate and carry on any business which, in his judgment, tended to the welfare of the institution," *advised* that this resolution was not sufficiently specific to authorize the president to execute an instrument under seal such as the bond required by Sec. 1225, Rev. Sts. 39, 158, *March, 1890*.

583. A by-law to the effect that in the recess of the board of regents, an executive committee of the board should "have general care of all matters pertaining to the welfare of the university," *held* not sufficient to empower such committee to enter into so legally formal and binding an engagement as the giving of a bond under Sec. 1225, Rev. Sts. 63, 467, *February, 1894*.

584. A bond furnished pursuant to the statute by any incorporated college or university should be accompanied by a duly certified copy of the charter or articles of incorporation showing that the institution is a corporation and has power to enter into the obligation. 63, 322, *January, 1894*; 65, 190, 191, *June, 1894*. The copy should be authenticated by the certificate of the official who is custodian of the record of the same. 64, 44, *February, 1894*. Where the copy was certified by a county recorder, not under seal, *held* that if he had no seal which he could affix, his official character should be certified to by the county official who was the custodian of his election and qualification. 64, 274, *March, 1894*.

585. Where the bond offered in compliance with the statute purported to be signed by the president of the corporation, it should be shown in connection with the bond that the person so signing had been duly elected such president by the corporation or by a managing body authorized by the articles of incorporation to elect him. 29, 307, *January, 1889*.

**586.** Where the trustees, regents, &c., have, by a resolution or vote of the board, duly authorized their President, or other officer, to execute the bond for the corporation, there should be furnished, with the executed bond, as evidence of the legality of the execution, an extract of the minutes of the proceedings of the board fully setting forth the adopting of the resolution giving the requisite authority; such extract being certified by the secretary, or other proper custodian of the records, under the seal of the corporation, as a true copy of such minutes. The certificate, or affidavit, of the secretary that such a resolution, giving a copy of it, was adopted, is not a sufficient substitute for the record evidence, and where the execution by the president rests only upon such a certificate, the bond will not be accepted. The only proper evidence of the proceedings of a body which keeps a record is the record itself or a transcript duly authenticated by the legal custodian, and where it exists its place cannot be supplied by the mere statement of the secretary or other official of the corporation. **29**, 106, **30**, 434, **33**, 220, **39**, 475, **40**, 363, **41**, 309, **48**, 226, *January, 1889, to July, 1891*; **55**, 180, **56**, 39, 308, **60**, 366, **62**, 122, 231, 460, *August, 1892, to December, 1893*; **63**, 322, 408, **64**, 117, 276, 304, **65**, 102, 190, 406, *January to August, 1894*; Cards 641, *November, 1894*; 771, 893, *January, 1895*; 2260, *May, 1896*; 2038, *August, 1899*.

**587.** Where the college was not incorporated, and therefore could not enter into the bond, and its trustees were merely appointees of certain regents of education in charge of all the public educational institutions of the State, *recommended* that a personal bond be required. **65**, 31, *May, 1894*.

**588.** *Held* that a State university, which, though managed by trustees appointed by the State, was not incorporated, was only a piece of property of the State, having no personal existence or capacity to give a bond. In such case, if the trustees are not incorporated, the bond for arms furnished under the statute will have to be a personal one. **64**, 304, *April, 1894*.

**589.** Where the university was not an incorporated institution, but property belonging to a Territory, by which it was carried on through trustees, and the legislature had made no provision for a special bond, *held* that the case was one in which a personal bond should be required. **41**, 377, *July, 1890*; **55**, 322, *September, 1892*. Where such an unincorporated university was the property of a State, *held* that the State would be the proper principal in the bond. **42**, 119, *July, 1890*. Where a college is not an incorporated institution, a board of trustees charged with its management is not legally authorized to give the bond required by the statute. **40**, 468, *May, 1890*.

**590.** Sec. 1225, Rev. Sts., as amended by the act of September 26,

1888, c. 1037, prescribes that a bond shall be furnished "in double the value of the property," but does not in terms require that *sureties* shall be given. *Advised* therefore that the Secretary of War would be authorized in his discretion to dispense with sureties if he deemed the bond of the principal to be sufficient, and that this discretion might well be exercised in favor of accepting without sureties a bond in which the principal was the city of Philadelphia as trustee for the Girard College Fund. 59, 176, *April, 1893*.

591. Where the penalty of the bond as offered was twice as great as the sum for which the president was, by resolution of the board, authorized to give bond, *held* that the bond could not, for this reason, be accepted and that a new bond should be furnished. 35, 82, *September, 1889*.

592. A form of bond presented for acceptance under the statute, which failed to recite that the college was of a capacity to educate one hundred and fifty male students, the complement required by the act of September 28, 1888, but stated its capacity as extending to the education of eighty only, *held* defective and not legally acceptable. 65, 48, *May, 1894*. It should be specifically stated in the bond that the capacity was for the education of 150 *male* students. 65, 182, *June, 1894*.

593. The bond offered under the statute should not omit the insurance clause, *i. e.* should contain a condition to the effect that the obligor shall keep the property duly insured until returned to the United States.<sup>1</sup> 63, 322, *January, 1894*.

BOND—Of States, &c., for arms, &c., furnished under statute.

594. The joint resolutions of July 3, 1876, and June 7, 1878, authorizing the Secretary of War to issue arms to certain States and to the Territories, provide that the governor in each case shall "give good and sufficient bond for the return" of the arms, &c., or payment for the same. *Held* that a bond given, under these statutes, by a governor of a Territory whose legislature had not authorized him to bind the Territory in this manner, could have no further legal effect than as the *personal* obligation of the governor; that what the statute contemplated was an official bond; and therefore that a governor's bond, given in the absence of special authority devolved upon him by the legislature to bind thereby the Territory, could not legally be accepted by the Secretary of War. XXXVIII, 167, *July, 1876*; XLI, 467, *November, 1878*; XLIII, 78, 93, *November, 1879*; LIII, 36, *September,*

<sup>1</sup>The laws and regulations governing the giving of bonds by colleges, &c., under Sec. 1225, Rev. Stat., are set forth in G. O. 70, A. G. O., 1897. But see the further provisions of Sec. 3 of the act of Feb. 26, 1901, amending Sec. 1225, Rev. Stat.

1886. And similarly *held* of a bond given by the governor of a State, upon an issue of camp and garrison equipage under the joint resolution of June 20, 1878. XXXIX, 656, *September, 1878*.

595. As the Secretary of War is empowered, in his discretion, to require bonds of disbursing officers of his department, though the same may not be prescribed by statute, so, in the case of the ordnance authorized, by the act of February 8, 1889, c. 116, to be delivered to the national volunteer homes, *held* that the Secretary of War would properly require that bonds be furnished for the safe-keeping and due return of such ordnance, though no such condition was indicated in the statute. This under his general authority as head of the department entrusted with such property, and in view of the provision of the act that the ordnance shall be delivered "subject to such regulations as he may prescribe." 51, 446, *January, 1892*.

#### BOND—Of Surety Company.

596. By Sec. 1191, Rev. Sts., the Secretary of War is empowered to decide upon the sufficiency of the bonds of disbursing officers of the army; the accounting officers of the Treasury having no authority in this regard. *Held*, therefore, that the Secretary was legally authorized to accept *surety companies* as sureties in such bonds, similarly as in the case of the bonds of contractors with the United States. 50, 118, *November, 1891*.

597. Under regulations published in G. O. 52 of 1893, as amended, entitled "Regulations and Instructions relating to Bonds of Contractors, Bidders, and Disbursing Officers," the War Department accepts, as surety on the bonds both of contractors and disbursing officers, "any company which is duly incorporated under the laws of the United States, or of any State, and is legally authorized to become such surety." Where a surety company has already on file in the War Department, the papers called for by the regulations, it is not required, in the absence of any change of its status, to re-furnish the same in connection with bonds which it may execute. 60, 41, *June, 1893*; 63, 127, *January, 1894*.

598. *Held*, that a bond of indemnity of a security company might, in the discretion of the Secretary of War, legally be accepted in place of the usual bond, given under Sec. 1225, Rev. Sts. Such acceptance would not *per se* release the college from its liability as bailee to take extraordinary care in preserving and duly returning the arms, but the instrument should be executed in such form as to leave no question as to such liability continuing. 64, 61, *February, 1894*.

599. The acceptance of an incorporated surety company as surety



is now authorized by the act of August 13, 1894 (28 Stat., 279). But before such corporation will be accepted by the War Department as a surety on a bond, it must file in the War Department the papers required by paragraphs 574, 576, and 577, A. R. (653, 655, and 656 of 1901). Cards 284, 2997, and 3280, *April, 1895, to July, 1899.*

600. The provision of the Legislative, Executive and Judicial appropriation act of March 2, 1895, requiring official bonds to be examined at least once every two years for the purpose of ascertaining the sufficiency of the sureties thereon, is sufficiently complied with as to bonds on which a corporation is surety, if the corporation files periodically in the War Department the financial statement required by A. R., 574 (653 of 1901). Card 2516, *August, 1896.*

601. The act of August 13, 1894, does not require a compliance with any laws or regulations which a State may impose to qualify a foreign surety company to do business within the State with the officers or citizens thereof. Under the act referred to a bond of the surety company to the United States would be equally valid whether or not it had complied with such laws or regulations of the State. Card 3604, *October, 1897.*

602. Where upon a change of office the superintendent of a surety company wrote to the War Department to the effect that the company was willing that the official bond pertaining to the old office and upon which the company was surety should extend to the new office, *held* that the letter of the superintendent was not sufficient to extend the bond as proposed; that to extend the same to the new office would require an instrument under the corporate seal referring to the bond in such a way as to identify it, executed by officers of the company authorized to bind it in the matter of executing bonds, but remarked that where, as in the particular case, there had been a change of office, the practice was to require a new bond.<sup>1</sup> Card 4224, *April, 1899.*

BOUNTY.

603. Bounty is not *pay*, nor is it properly an "allowance" in the sense in which that term is ordinarily used as referring to the regular pecuniary emoluments of soldiers other than pay.<sup>2</sup> X, 661, *December, 1864*; XV, 356, *June, 1867.*

<sup>1</sup> But see note 1, page 156, *ante.*

<sup>2</sup> The term "allowances," however, when employed in a general sense, has been regarded as including bounty. Thus see 13 Opins. At. Gen., 188, 197, where it is held that the general forfeiture of pay and allowances due at the date of the offence, imposed upon deserters by par. 1358, Army Regs., embraced instalments of bounty due at the time of the desertion; also *United States v. Landers*, 2 Otto, 77, where the court goes so far as to hold that forfeiture of "pay and allowances," imposed by sentence, includes bounty.



604. The two years' service required by the act of 1861 need not have been continuous service. XI, 500, *March, 1865*. Nor, if two years' service was rendered, does it affect the right of the soldier to bounty that during a material part of the period he was detailed upon and performed a *quasi* civil duty as a clerk. XXXI, 507, *July, 1871*.

605. In the absence of any express statutory provision forfeiting a soldier's right to bounty where he has been guilty of desertion, *held* that the mere fact that a desertion had been committed by a soldier at some period of his term of service could not affect his right to bounty, provided that, having served the requisite period, he was finally *honorably* discharged. Thus, in repeated cases of deserters, who, after being restored to duty without trial, or upon full execution or remission of sentence for whether the deserter be brought to trial and punished or not is immaterial had performed faithful service, and been finally honorably discharged; *held* that no forfeiture of bounty had been incurred.<sup>1</sup> XII, 139, *December, 1864*; XV, 356, *June, 1865*; XVIII, 333, *November, 1865*; XIX, 269, *December, 1865*; XXI, 614, *August, 1866*; XXII, 653, *March, 1867*; XXIX, 127, *July, 1869*; XXXVI, 478, *May, 1875*; XXXIX, 413, *February, 1878*; XLIII, 218, *February, 1880*.

606. Where a veteran volunteer was honorably discharged, not by reason of the expiration of his full term or because his services were no longer required by the Government, but because of his promotion to the grade of a commissioned officer, *held* that he was entitled only to such proportion of the bounty and premium specified in G. O. 191, War Dept., 1863, as had accrued at the date of his discharge. XII, 548, *August, 1865*.

607. A soldier in the war of the rebellion, who enlisted and served for a period of "two years or during the war if sooner ended," became entitled, at the end of such term, under the act of July 22, 1861, to a bounty of \$100. If he enlisted after April 19, 1861, for a period of not less than three years and served through this term, or until the close of the war, he was entitled to an additional bounty of \$100, under the act of July 28, 1863. In either case, if discharged before the expiration of the required time, on account of wounds or injuries received in the service in the line of duty, he became entitled to the bounty. 64, 422, *April, 1894*.

#### BREVET RANK.

608. Brevet rank can, properly, neither be conferred, nor take effect, except as an incident to full rank of a lower grade. XXI, 608, *August, 1866*.

<sup>1</sup>See U. S. v. Kelly, 15 Wallace, 34.

609. In view of the repeal (by the act of March 1, 1869) of the old 61st Article of war (which did away also with the portion of par. 10 of the Army Regulations which was derived therefrom), an officer, except where specially assigned to duty according to his brevet rank by the President, is no longer entitled to precedence on courts martial or otherwise by reason of his brevet rank. XXXV, 447, *June, 1874*.

610. *Held* that a confirmation by the Senate, on March 3, 1869, of a brevet appointment previously made, was of no effect and conferred no right to a brevet commission; Congress having, two days before, by the act of March 1, 1869, c. 52, enacted that "from and after the passage of this act commissions by brevet shall only be conferred in time of war." XXXIX, 209, *October, 1877*.

611. Under Sec. 1211, Rev. Sts., an officer may legally be assigned to duty according to his brevet rank for a *special* command or duty, and in such case the assignment will not be effective generally, but only for the purposes of such command or duty and during its continuance. Thus *held* that an officer assigned to duty according to his brevet rank "while in command of" a certain department, could legally exercise the authority and privileges of such rank only when holding such command, and for the purposes of the same.<sup>1</sup> XLII, 21, *October, 1878*.

612. When an officer has been duly assigned to duty or command according to a certain brevet rank, that rank becomes his actual military rank for the period of the assignment. He is empowered to exercise the authority which belongs to such rank under the circumstances, to wear the uniform, and to be addressed by the title, of such rank, &c. *Held*, however, that a colonel, assigned to command according to a brevet rank of general, was not *entitled* to the aids-de-camp of a general (major or brigadier), but, as indicated in par. 35, A. R. (33 of 1895; 40 of 1901), could be "allowed" the same only "with the special sanction of the War Department" in other words, by the authority of the Secretary of War. XLII, 21, *October, 1878*.

#### BRIDGE.

613. The power of Congress to legislate for the prevention and removal of physical obstructions to navigation in public rivers in general,<sup>2</sup> having been allowed to lie dormant for nearly a century, began to be exercised in the act of July 5, 1884, c. 229, s. 8, followed by the

<sup>1</sup> But see now act of March 3, 1883 (1 Sup. R. S., 400), which provides that officers of the army shall only be assigned to duty or command according to their brevet rank when actually engaged in hostilities.

<sup>2</sup> As to the constitutionality of the exercise of this power by Congress, see *Miller v. Mayor of New York*, 109 U. S. 385, 393-394.

more explicit legislation on the subject of the act of August 11, 1888, c. 860, secs. 9 and 10; such power having been previously left to be exercised by the States.<sup>1</sup> 42, 85, *July, 1890*. The power thus assumed by Congress is more fully exercised in the act of September 19, 1890, c. 907, secs. 4, 5 and 7, and sec. 3 of the act of July 13, 1892, c. 158.<sup>2</sup> A distinctive feature of this legislation is that it in effect precludes States from authorizing the construction of bridges over navigable waters which are not wholly within their territorial limits, and provides that it shall not be lawful to commence the construction of a bridge over navigable water of the United States under any act of a State legislature "until the location and plan of such bridge" have "been submitted to and approved by the Secretary of War." *Held*, under this provision that the authority of a State for the erection of a bridge over navigable water within the State should be shown as a condition precedent to the approval by the Secretary of War.<sup>3</sup> 55, 61, 140, *August, 1892*; 62, 94, *October, 1893*. The fact that the title to the soil under the water is vested in a municipality of the State does not affect the power of the State to grant such authority, nor dispense with the necessity of its doing so. The title to the soil is distinct from the right of conservation. Though this title be vested in a town by the State, there remains in the latter by reason of its sovereignty, "a *jus publicum* of passage and repassage, with consequent power of conservation,"<sup>4</sup> under which power it may concede the authority required by the statute. 62, 94, *supra*.

614. A river is a navigable water of the United States when it forms by itself or by its connection with other waters a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. If a river is not itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States but only a navigable water of the State.<sup>5</sup> So *held*, that Devil's Lake being wholly within the State of North Dakota and having no visible outlet was not a navigable water of the United States and therefore not subject to the laws of Congress relating to such waters. A bridge may be built across this waterway under the laws of the State without reference to the Federal govern-

<sup>1</sup> See *Willamette Iron Bridge Co. v. Hatch*, and authorities cited, 125 U. S., 1.

<sup>2</sup> The existing legislation on the subject will be found in section 9, *et seq.*, of the River and Harbor Act of March 3, 1899 (30 Stats. 1151).

<sup>3</sup> See *L. S. and M. S. R. Co. v. Ohio*, 165 U. S., 305, and 20 Opins. At. Gen., 488.

<sup>4</sup> 6 Opins. At. Gen., 172, 178.

<sup>5</sup> *The Montello*, 11 Wall., 411. See, also, authorities cited in note 1, page 493, *post*.

ment unless the bridge is to be located on Federal property. Card 7750, *March, 1900.*

615. According to the views and practice of the War Department there is no general legislation of Congress authorizing the construction of bridges over streams or waterways, the navigable portions of which are not wholly within the limits of a single State, except as to bridges over the Ohio River.<sup>1</sup> Such authority has hitherto been given, with the exception stated, by special acts, which have uniformly contained provisions requiring that the plans of the bridges be submitted to the Secretary of War for approval before construction is commenced. But in the case of a stream or waterway whose navigable extent is wholly within the limits of a single State, Congress has provided by Sec. 7 of the River and Harbor Act of Sept. 19, 1890, as amended by Sec. 3 of the corresponding act of July 13, 1892, that a bridge may be built thereover under authority of an act of the State legislature, provided the plans and location thereof are approved by the Secretary of War.<sup>2</sup> Cards 307, *September, 1894*; 1375, *May, 1895*; 1943, *January, 1896*; 2448, 2470, *July, 1896*; 2596, *September, 1896*; 2677, *October, 1896*; 3047, *March, 1897*; 3428, *August, 1897*. In the latter case the plans of the bridge should be accompanied by proper evidence that the State has authorized its construction. Card 1389, *May, 1895.*

616. Sec. 7 of the act of 1890, in leaving the matter of the authorization and construction of bridges over navigable waters wholly within States entirely to the jurisdiction of the State, except in so far as to require the approval by the Secretary of War of the location and plan of the bridge, indicates that Congress did not desire to exercise any further control over the subject. So, upon an application for the approval by the Secretary of War of the plans of a bridge over the Harlem River which is wholly within the State of New York, *held*

<sup>1</sup> See act of Congress approved Dec. 17, 1872 (17 Stats., 398), as amended by act approved Feb. 14, 1883 (22 Stats., 414).

<sup>2</sup> See 20 Opns. At. Gen., 488, and Lake Shore and Michigan Southern Ry. Co. v. Ohio, 165 U. S., 365. The intention of Congress is more clearly expressed in section 9 of the River and Harbor Act, approved March 3, 1899 (30 Stats., 1151), which, after making it unlawful to construct any "bridge, dam, dike, or causeway" over any navigable water of the United States until the consent of Congress thereto shall have been obtained, &c., specifically provides: "That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced."

Under date of Sept. 25, 1899, the Secretary of War held that this section does not authorize the Secretary of War or the Chief of Engineers to approve the plans for a bridge or other structure which would be an obstruction to navigation liable to be proceeded against under the other sections of the act or of the statutes theretofore existing, that the intent of the section appears to be to commit to the States the determination of the question whether or not there should be a bridge at any particular place over navigable waters wholly within the State, and to commit to the Secretary of War the protection of navigation against obstructions by such a bridge.



that the fact of the unusual importance of this stream, and of its immediate connections with great interstate waterways and the sea, did not except it from the jurisdiction of the State under the statute or make necessary any special or additional legislation by Congress for the authorization or control of its system of bridges. 53, 354, *May, 1892*.

617. As the object of this legislation is to protect the navigable waters of the United States from unreasonable obstructions, *held*, that it should not be construed to authorize the location and plan of a bridge which would have the effect of stopping navigation at the point where it is to be constructed. Card 5863, *February, 1899*.

618. Where the act of a State legislature required a *draw*, and the plan of the bridge submitted did not provide for one, *held*, that there being no State authority for the construction of the bridge as proposed, the Secretary of War was without jurisdiction to approve the plans presented. Card 1443, *June, 1895*.

619. The street railway companies of Duluth, Minnesota, and Superior, Wisconsin, applied for permission to construct a temporary structure of piles and pontoons across the St. Louis River between Minnesota and Wisconsin, the structure to be put on and through the ice after navigation had entirely closed and to be removed before the opening of navigation in the spring. *Held*, that the structure was not a bridge within the meaning of the legislation on the subject and that the Secretary of War had authority to grant the permission requested. Card 705, *December, 1894; November, 1895, and November, 1896*.

620. Where a special statute (act of Congress), authorizing the erection of a bridge over navigable water by a railroad corporation named, provided that the bridge should not be commenced till the company should submit for approval by the Secretary of War a certain plan and design with designated particulars and specifications, *held* that the authority of the Secretary was thus restricted, and that he could not lawfully act and approve till the *data* described were submitted. 30, 29, *January, 1889; C, 163, May, 1890*.

The application for the approval must be accompanied by the particulars specified in the act; otherwise the Secretary has no jurisdiction. Here the map and plan submitted failed to show the character of the structure, as also the full shore line and the direction and strength of the current, and gave only partial soundings. 43, 259, *October, 1890; C, 205, 208, 209, October, 1890*. Plans are insufficient as a basis for action where they do not show what the statute requires.<sup>1</sup> Where the special act designates the kind of bridge author-

<sup>1</sup>In practice, however, the location and plans of bridges have been approved, although the map of location failed to show all the details specified in the statute, the provisions of the statute, in this respect, being treated as directory.



ized, details of the plan, &c., the Secretary of War is empowered to approve only such a bridge and such plans as comply with the statute. If he give his approval to others, his action will be ineffectual in law, and the bridge if completed will not be a legal structure.<sup>1</sup> C. 229, November, 1890; Cards 1477, June, 1895; 1532, July, 1895; 8892, September and November, 1900.

621. Where the special act does not require that a plan of the bridge shall be approved by the Secretary of War, he will preferably not give his approval to any plan, since if he did so he might perhaps commit the government to the sanction of a bridge which might prove to be an obstruction to navigation. 25, 96, June, 1888.

622. Where a special act authorizes the placing of a bridge across navigable water of the United States, by a railroad or other corporation, in addition to the plan of location and particulars required by the statute, a standing "rule" of the War Department of July 31, 1886, requires certain other evidence to be submitted to the Secretary of War, to establish the legal existence and authority of the corporation and its acceptance of the privileges and conditions granted and imposed by the act.<sup>2</sup> LIII, 379, April, 1887; LVI, 574, September, 1888. In particular cases still other evidence may be essential; as in a case where there has been a consolidation of two companies, when copies of the agreement and of the enactment authorizing the consolidation, &c., should also be submitted. LII, 199, May, 1887.

623. Under the rule of July 31, 1886, it has been decided by the Secretary of War that the copy of the charter or articles of incor-

<sup>1</sup> See *Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 125 U. S., 260, 263; *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 2 Fed. Rep., 265; *Gildersleeve v. New York, N. H. & H. R. Co.*, 82 Fed. Rep., 763; *Assante v. Charleston Bridge Co.*, 41 Fed. Rep., 365.

<sup>2</sup> This rule is as follows:

*Rule to be observed when application is made, pursuant to an act of Congress, for the approval by the Secretary of War of plans for a bridge, or a right of way, or other privilege.*

When an act of Congress granting a privilege to an individual or a corporation contains a clause requiring the approval of the Secretary of War to certain matters of detail, the grantee will be required to establish his identity, if the grant is to a corporation, there will be required a copy of its charter or articles of incorporation, and of the minutes of the organization of the company; also extracts from the company minutes showing the names of the present officers of the company and the acceptance by the company of the provisions of the act of Congress, all properly authenticated.

The identity of the grantee having been established, and the provisions of the law having been complied with, the terms, conditions, requirements, &c., will be reduced to writing. This paper will be signed by the grantee in token of his acceptance of the conditions imposed, and will be approved by the Secretary of War, one copy thereof to be filed in the War Department and the other given the grantee.

WM. C. ENDICOTT,  
Secretary of War.

WAR DEPARTMENT, July 31, 1886.

poration of the company should be authenticated under the signature and official seal of the Secretary of State, or other proper State official, in whose office the original is on file. *Held* that a printed copy of a copy, under the certificate of the Secretary of the company and its corporate seal, was not sufficient evidence. LIII, 32, 37, *September, 1886*. But the fact that the company has not furnished proper evidence of its incorporation does not affect the jurisdiction of the Secretary of War to approve plans of a bridge submitted, and the objection may be waived. Card 447, *October, 1894*.

624. *Held* that the statement of the Secretary of the company that it had accepted the provisions of the special act (or of the general act of July 5, 1884), was not proper evidence under the rule, but that there should be furnished a duly authenticated extract from the minutes of the company exhibiting the fact of acceptance. It should similarly be shown that the map of location and plan of bridge submitted have the approval and sanction of the company. LIII, 12, 163, *September and October, 1886*.

625. It is well-settled that an unrestricted grant of an authority to construct a railroad from one designated point to another includes by implication the authority to bridge navigable streams *en route*, where the road cannot practically or reasonably be constructed without crossing them.<sup>1</sup> Thus, where, by an act of Congress of June 1, 1886, authority was given to a railway company to construct and operate a railway through the Indian Territory, from a point at or near Fort Smith to a point to be selected by the company on the northern boundary line of the Territory, *held* that the company would be authorized to bridge the Arkansas river. 25, 92, *June, 1888*. Similarly *held* as to bridging the same river by the Kansas City, Pittsburg and Gulf Railway Company under the act of Congress approved February 17, 1893. Card 1510, *July, 1895*.

626. An act of May 14, 1888, in authorizing the Tennessee Midland Railway Company to bridge the Tennessee River, provided "that this act shall be null and void if the actual construction of the bridge herein authorized be not commenced within one year and completed within three years from the date of the approval of this act." In the absence of words making *time* an essential element of the performance, legislative acts of this character, although they may designate a period within which a certain thing is to be done, are construed to be directory only and not mandatory as to time. But *held* here that the statute was mandatory and that the time specified was made of the essence of the grant, and therefore that the company, in applying for the

<sup>1</sup> *Clouff on Waters*, 3d Ed., § 129; *Fall River Iron Works Company v. Old Colony and Fall River R. R. Co.*, 5 Allen, 221; *U. P. R. R. Co. v. Hall*, 94 U. S. 343.

approval by the Secretary of War of the location and plan, required by the act to be approved by him, must show that the work had been commenced within the time fixed. 33, 400, *July, 1889*; 47, 30, *May, 1891*; Card 8736, *August, 1900*.

627. Where the act of Congress authorizing the construction of a bridge fixes the time for the completion thereof, the Secretary of War cannot grant an extension of the time. In such a case the bridge should be completed as soon as possible and application made to Congress for the necessary extension. Card 250, *November, 1894*.

628. The bridge across the Mississippi River connecting the cities of Rock Island, Illinois, and Davenport, Iowa, belongs to the United States, which has complete control of the same, subject to the right of way of the Chicago, Rock Island and Pacific R. R. Co. (under the acts of June 27, 1866 and March 2, 1867). The bridge is both a wagon and a railroad bridge. The railroad company has no interest in or authority over the wagon way or right to dictate what use shall be made of it. The wagon way is established for the use of the United States, not for that of the public, but has been opened to the public for passage and transportation subject to conditions, one of which is that certain railroad freights shall not be conveyed over it. *Held* that neither the railroad company nor the commanding officer of the arsenal was authorized to prevent the American Express Company from hauling across between the two cities express matter not of the character precluded by such conditions. 34, 213, *July, 1889*.

629. Authority granted by an act of Congress to a corporation or an individual to construct a bridge over navigable water of the United States is a franchise which cannot be assigned without the permission of the grantor.<sup>1</sup> And the Secretary of War cannot in such a case lawfully entertain an application for the approval by him of the plans of a bridge made by a party or a corporation to which the right to build the bridge has been, without the authority of Congress, transferred. XLIX, 618, *December, 1885*; 31, 378, *April, 1889*; 32, 469, *June, 1889*. Where a specific grant to build a bridge for a specific purpose—*i. e.*, to complete its line and to accommodate the public—is made to a railroad corporation by an act of Congress conferring no power of substitution, new legislation is requisite to authorize the transfer of the franchise to another company. XLIX, 618, *supra*; 630, *January, 1886*; Card 1660, *August, 1895*.

630. Where the authority for the bridge is given in terms to the company, "its successors and assigns," it is held that these words, being the ordinary words of limitation of an estate granted in per-

<sup>1</sup> Branch v. Jessup, 100 U. S., 408; Thomas v. Railroad Co., 101 U. S., 71.

petuity to a corporation, confer no right of transfer.<sup>1</sup> There must still be specific authority of statute for the purpose, or the transfer, if assumed to be made, will be ineffectual and void. 31, 378, *April, 1889*; 34, 276, *August, 1889*.

631. Where the plans were submitted and the approval of the Secretary was applied for, not by the corporation to which the authority to build the bridge had been granted by an act of Congress, but by a construction company, which, by contract, was to erect all the bridges for such corporation, and to own them when completed, *held* that the Secretary of War could not legally approve the application, the substitution of the company not having been authorized by Congress. 31, 378, *April, 1889*.

632. The acts of July 5, 1884, c. 229, s. 8, and August 11, 1888, c. 860, s. 9, in providing for the removal of obstructions to navigation caused by *bridges*, by requiring their alteration, &c., do not empower the Secretary of War to resort to military force to effect the purpose. They leave the execution of their provisions to the law officers and the courts. They make it the duty of the Secretary of War, whenever the owners or responsible parties, after having been notified to do so, neglect to so alter a bridge as to abate the obstruction, to apprise the Attorney General who is thereupon required to initiate the proceedings specified in the statute. 42, 85, *July, 1890*.

633. Under the act of August 11, 1888, it was *advised*—though the statute did not require it—that the Secretary of War, being constituted judge in the first instance, would properly give the corporation, &c., owning or controlling a bridge an opportunity to be heard, and not decide the question of obstruction or alteration upon the report of the engineer officer alone. 35, 186, *September, 1889*. But it was also *held* that the notice was sufficiently specific, under the law, though it did not indicate how the proposed alteration was to be made; that the Secretary of War indeed was not empowered to prescribe *how* the bridge should be altered, but that the responsibility for the proper alteration was wholly upon the corporation. 28, 14, *November, 1888*; 35, 265, *September, 1889*.

634. The act of September 19, 1890, sec. 4, however, amended the provision as to *notice* in the act of August 11, 1888, s. 9, by requiring that the notice, to be given to the person or corporation, owning or controlling a bridge which obstructs navigation, to so alter it as to do away with the obstruction, "shall specify the changes required to be made," such party being first given a "reasonable opportunity to be heard." 49, 72, *September, 1891*.

<sup>1</sup> 8 Opins. At. Gen., 512.



635. The power expressly vested in the Secretary of War by sec. 4 of the act of September 19, 1890, to determine whether a bridge is an obstruction to navigation, is of a judicial nature, not ministerial merely.<sup>1</sup> The law makes him the agent of the United States for the purpose and vests him with a specific discretion.<sup>2</sup> *Held* that the power devolved pertained to him alone and could not legally be exercised by the Assistant Secretary of War. C. 135, *May, 1890*.

636. Especially in view of the fact that the giving of the notice to alter, under the act of 1890, s. 4, is a proceeding preliminary and necessary to the fixing of criminal liability upon a failure to make the alteration, such notice should be strict and precise.<sup>3</sup> It should set forth the situation and character of the bridge so as clearly to identify it, stating the name of the owner, &c., and specify fully the change or changes "required to be made" as to height, width of span or draw-opening, &c.; and it should appear from the notice, or in connection therewith, that the party has had a "reasonable opportunity to be heard." 43, 431, *November, 1890*.

637. Before the notice to alter a bridge is given, the party owning or controlling the same is entitled, under the act of 1890, s. 4, to be heard on the changes specified in the notice as well as on the time in which they are to be made; and unless an opportunity for such hearing has been given, the party will not be liable to the penalties specified in sec. 5, of the said act. Cards 798, *December, 1894*; 1511, *November, 1895*.

638. *Held*, that the provision of the act of August 11, 1888, as to the proceedings to be taken against a corporation refusing after due notice under that act to alter a bridge, was repealed by that of the act of September 19, 1890, and that such corporation could not now be prosecuted without a new notice under the existing statute, followed by a failure to comply. An offender cannot be punished under a penal act

<sup>1</sup> In *U. S. v. Rider*, 50 Fed. Rep., 406, it was held (by Sage, U. S. Dist. J.) that this section was unconstitutional in delegating to the Secretary of War "powers exclusively vested in Congress." See, however, *Rider v. U. S.*, 178 U. S., 251. At the trial of this case in the circuit court there was a division of opinion, but the presiding judge charged the jury that Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge, such as the one in question, was an unreasonable obstruction to navigation, and on writ of error to the Supreme Court the judgment was reversed, without deciding this question, on the ground that the municipal officers controlling the bridge did not have public moneys which could lawfully be applied to the purpose and could not obtain such moneys within the time specified in the notice. In an able and exhaustive opinion by Acting Atty. Gen. Dickenson, dated Oct. 24, 1890, it was held that this act was not an unconstitutional delegation of legislative function; that Congress is not required to consider each case of alleged obstruction, but may generally define the offence and leave the facts to be determined by a court or special tribunal. 21 Opins. At. Gen., 490, and authorities cited.

<sup>2</sup> *Miller v. Mayor of New York*, 109 U. S. 385, 393.

<sup>3</sup> "A purely statutory authority or right must be pursued in strict compliance with the terms of the statute." Bishop, *Written Laws*, § 119.



which has expired or been repealed prior to conviction.<sup>1</sup> So, *advised* that proceedings initiated under the act of 1888 be commenced *de novo*. 43, 431, *November, 1890*; 49, 72, *September, 1891*. Under the act of 1890, s. 4, it is made the duty of the Secretary of War to initiate proceedings (by notifying the proper district attorney) only in case of alterations, not made, of *completed bridges*; as to other obstructions, the duty to enforce the provisions of the act is devolved upon the "officers and agents" specified in s. 11. 52, 343, *March, 1892*.

639. Where, after notice to alter a bridge, as constituting an obstruction to navigation, the bridge company owning the same has failed, and the franchise has passed into the hands of a receiver, the proper method of procuring the alteration to be made is by motion in the proper court for an order requiring the receiver to make it. 37, 404, *January, 1890*. In such a case neither the owner nor the receiver can be made personally amenable for failure to alter. 60, 118, *June, 1893*. A similar proceeding is to be pursued where a receiver has been appointed before notice or before the obstruction was developed. Thus where a bridge, on the line of a railroad, which had been placed under receivers, was discovered to be an obstruction to navigation because of having no draw, *advised* that the Secretary of War apply to the Attorney General to have the case brought by the proper motion to the attention of the court by which the receivers were appointed, whose duty it then would be to order the receivers to make the alteration out of the income accruing from the operation of the road.<sup>2</sup> And *held* that it would not be necessary to notify the receiver as such, since without the order of the court he could not legally incur the requisite expense for the purpose.<sup>3</sup> 60, 118, *supra*; 62, 55, *October, 1893*. And see 64, 399, *April, 1894*.

640. Where a bridge has been reported an unreasonable obstruction to navigation the Secretary of War may proceed under sec. 4 of the act of September 19, 1890, to give the owners thereof a hearing with a view to notifying them to make the necessary alterations. But if in the meantime the owners waive hearing and notice and submit plans of alterations, the Secretary may approve the same; and his approval will in effect prescribe that the bridge be altered as indicated by the plans. This procedure has been followed in a number of cases. Card 1157, *March, 1895*.

641. The Department of Public Works of the City of New York requested that the necessary steps be taken to permit that department to close the drawbridge across Harlem River at Madison Avenue for

<sup>1</sup> Endlich, *Interpretation of Statutes*, 435.

<sup>2</sup> See U. S. v. St. Louis, A. & T. R. Co., 43 Fed. Rep., 414.

<sup>3</sup> Cowdrey v. Galveston, &c., R. Co., 93 U. S., 352.

not to exceed two weeks to make needed repairs. *Remarkd.* that there is no statute of the United States which in terms empowers the Secretary of War to authorize the closing of a drawbridge during its repair, but recommended that the applicant be advised that no steps would be taken by the War Department in regard to the bridge as an obstruction to navigation during the time necessary for its repair. Card 3299, *June, 1897.*

### BURGLARY.

642. Burglary at common law is the breaking and entering of a dwelling in the night time with intent to commit a felony. Where a soldier was brought to trial upon a charge of "Burglary," with a specification setting forth that he forcibly entered the quarters of an officer in the night, with intent to steal, and it appearing that he entered through an *open* window, *held* that, although the offence shown was not a burglary in law—the essential element of a breaking being wanting—the charge and specification, taken together, omitting this element, made out a sufficient pleading of a disorder to the prejudice of good order and military discipline, under the 62d Article of war.<sup>1</sup> XXXVIII, 391, *December, 1876.* And similarly *held* of an offence charged as "conduct to the prejudice, etc.," and described in the specification as "burglariously" breaking and entering a post trader's store in the day time. XXX, 348, *August, 1870.*

## C.

### CADET.

643. An unemancipated minor can acquire no residence distinct from that of his father or parent;<sup>2</sup> otherwise in the case of an emancipated minor. Card 6615, *June, 1899.* So *held* that unemancipated minors whose fathers resided in certain States and congressional districts, could not, by removing to and abiding in other States or districts, acquire such an "actual residence" therein as to render them eligible for appointment as cadets under Sec. 1315, Rev. Sts.<sup>3</sup> XXIX, 83, *July, 1869; XXXI, 313, April, 1871.*

<sup>1</sup> See G. C. M. O. 205, Hdqrs. of the Army, 1876.

<sup>2</sup> See *Crawford v. Wilson*, 4 Barb. 505; *Brown v. Lynch*, 2 Bradf. 214; *Wheeler v. Burrow*, 18 Ind. 14; *Hiestand v. Kuns*, 8 Blackf. 345; *Allen v. Thomassen*, 11 Humph. 536; *Hardy v. De Leon*, 5 Texas, 211. Story, *Conflict of Laws*, § 46.

<sup>3</sup> This opinion was concurred in by the Attorney General, in 13 Opins. 130.

644. *Held* that a minor whose father was a foreigner domiciled in Cuba, and who was himself commorant in the United States only for the purpose of being educated, was not eligible for appointment as a cadet from a congressional district. XXXV, 446, *June, 1874*.

645. *Held* that the mere fact that an officer of the army was on duty under military orders in a certain Territory, did not make his minor son eligible for appointment as a cadet from such Territory, the fact of the father's being thus on duty not being sufficient evidence of his being a legal resident therein. XXX, 528, *July, 1870*. So where an army officer was temporarily on duty as military instructor at a college in a congressional district which was not his actual residence, *held* that his unemancipated minor son commorant there was not eligible for appointment as a cadet from such district. Card 1220, *April, 1895*.

646. In view of the provision of the act of 1843, incorporated in Sec. 1315, Rev. Sts., that "the corps of cadets shall consist of one from each congressional district," &c., it has been customary, though the same is not required by law, for the President, in appointing cadets from congressional districts, to appoint them upon the nomination of the members of Congress representing such districts in the House of Representatives. But where a member of the Forty Sixth Congress, representing a certain numbered district of a State, nominated for appointment as cadet a resident of a county not within such district as previously constituted, but within a new district having indeed the same number but constituted mostly of different counties, and which had been created by the State legislature in a redistricting of the State since the election of such member, *held*, that such nomination could not properly be accepted by the President as a basis for an appointment. This, for the reason that the member, at the time of the nomination, did not represent the new district containing the said county, but said district was in fact represented in Congress by no one, and could not be so represented till March 4, 1881, when the Forty Seventh Congress would commence to exist. XLII, 601, *April, 1880*.

647. Under the law the power of appointing cadets is in the President; and with the exception of the cadets appointed at large, the appointments are required to be made from "actual residents of the congressional or territorial districts or of the District of Columbia, respectively, from which they purport to be appointed". The privilege of selecting those appointed from congressional districts, which has been accorded to members of Congress, is one which rests on regulation and long practice, and this privilege is limited to the nomination of such persons as meet the requirements of law. In making the

appointments it is the duty of the President to appoint only such persons as comply with the provisions of the Statute, and the decision of the Representative in the matter does not relieve him from this duty. Card 6615, *June, 1899.*

648. The State of Ohio having been re-districted by an act of its legislature, *held*, 1, That the cadets now at the Military Academy appointed from congressional districts of Ohio, should, where the numbers of their districts had been changed, be credited to the new districts, so as to appear on the list as representing the districts now actually including the towns, &c., which were their places of residence when appointed; 2, That existing conditional appointments made under Sec. 1317, Rev. Sts., providing that such appointments shall be made one year in advance of admission to the Academy, and which accordingly had been made prior to the re-districting, were valid and should stand; the appointees being deemed *entitled* to admission at the designated time, subject to the prescribed conditions; 3, That future appointments should be made according to the districts as newly established and numbered; any increased delay that might thus be caused in the filling in of vacancies for appointments for particular districts being but a necessary result of the new legislation. XXXIX, 515, *June, 1878.*

649. Sec. 1317, Rev. Sts., prescribes that cadets shall be appointed one year in advance of the time of their admission to the academy, &c. It is to the date of appointment and not to date of admission that the qualification as to residence (Sec. 1315, Rev. Sts.) refers. Thus *held*, that a change of residence by a father would not affect the appointment of his minor son, legally made prior to the change of residence.<sup>1</sup> 45, 288, 303, *February, 1891.*

650. Assuming that an emancipated minor is so far *sui juris* that he can acquire and change domicile like a person of full age, the same rule of *intention* applies to determine the question of domicile in his case as in any other. There must be an *animus manendi*. So where an alleged emancipated minor took up a so-called residence in a congressional district other than that of his father's habitation, which residence was intended to be merely temporary and was resorted to for the sole purpose of securing an appointment as cadet from that district, *held* that such supposed emancipation and pretended change of domicile could have no legal effect in qualifying the party for such an appointment under Sec. 1315, Rev. Sts. LVI, 473, *August, 1888.*

651. A party was duly nominated and appointed as a cadet for a certain congressional district one year in advance agreeably to Secs. 1315

<sup>1</sup> See 13 Opins. At. Gen., 130.



and 1317, Rev. Sts. Later, another party was, by the same member of Congress, nominated for a *provisional* appointment,—i. e., an appointment in the event of the regular nominee being found disqualified or failing to pass the examination,—and was appointed accordingly. Subsequently, the regular nominee having resigned his appointment, a third person was nominated in his stead by the same member, and (under Sec. 1317, Rev. Sts.) appointed to fill the vacancy. *Held* that this appointment was a valid one, and that the provisional appointee had no legal claim to have received the same. The statute law does not recognize such "provisional" appointments; the same being resorted to in the practice of the War Department, as a matter of convenience, in order that there may be a person at hand to take the place of a regular nominee who may fail at the last moment, and the embarrassment of a vacancy occurring at that time be thus as far as possible avoided. The provisional appointee, or "alternate," was not *entitled* to be substituted for the regular appointee on his resignation, and not having been so substituted, but another person having been selected, he remained with precisely the claim which he had originally, *viz.*, to present himself for examination and appointment in case the regular nominee was not accepted, the only difference being that the regular nominee had meanwhile been changed. XLII, 162, *February, 1879*.

652. Sec. 1318, Rev. Sts., prescribes that appointees to the Military Academy shall be admitted only between the ages of 17 and 22 years. The academic year begins on September 1. Therefore *held* that an appointee who would not be seventeen until the preceding August could, without a violation of the statute cited, be permitted to take the June examination, and if found qualified, to remain at the academy at his own expense until of lawful age to be admitted. Card 3886, *February, 1898*.

653. Where a regular appointee as cadet, having resigned, was again nominated to fill his own vacancy, the same not having meanwhile been filled by the appointment of another, *held* that the President was empowered, under Sec. 1317, Rev. Sts., to re-appoint him. XXXI, 195, *February, 1871*.

654. Cadets are amenable to trial by court-martial for violations of the Regulations of the Academy, as "conduct to the prejudice of good order and military discipline."<sup>1</sup> XXXVI, 129, *December, 1874*; 61, 370, *September, 1893*.

655. In view of the provisions of Sec. 1325, Rev. Sts., *held* that the

<sup>1</sup> In this connection may be noted the opinion of the Solicitor General (15 Opins. At Gen., 634) that, except for the offence of hazing, specially made punishable by the act of June 23, 1874, cadets of the *United States Military Academy* are not subject to trial by court-martial. That cadets of the Military Academy are a part of the army, see Sec. 1094, Rev. Sts.



President would not be empowered to reappoint a cadet, discharged as deficient in either conduct or studies, except upon the recommendation of the Academic Board. XLIII, 372, *July, 1880*; Card 3796, *January, 1888*.

**656.** The Superintendent of the Military Academy can have no power, by virtue of a regulation of the academy, to try and punish a cadet for a military offence for which, under the articles of war, he is amenable to trial by court-martial. A regulation assuming to confer upon him such power would be in contravention of law and inoperative. Otherwise of a regulation which merely authorized a measure of school discipline. So, where a cadet, on arraignment for a military offence, pleaded in bar that he had already, for the same offence, been punished by reduction from cadet officer to cadet private, under par. 107, Academy Regulations, *held* that, regarding such reduction as a form of school discipline only, the plea was properly overruled by the court. **61, 373, September, 1893.**

**657.** A cadet applied to have his name changed on the Register of the Military Academy. *Held* that the Secretary of War would not be empowered to change the name as such, though he might make a new contract with the cadet in the new name. But *advised*, as the preferable mode of proceeding, that the cadet first procure the name to be changed in the mode prescribed by the statutes of his own State, after which the register would of course be made to correspond. **25, 126, June, 1888.**

**658.** *Held* that *naval cadets*, not having been commissioned officers, could not, upon afterwards becoming lieutenants in the army, compute, for relative rank, their period of service as such cadets. **25, 214, June, 1888.**

#### CAPTURED PROPERTY.

**659.** It is a general principle that captured property of an enemy with whom we are at war accrues to the United States. The application however of this principle during the late civil war was affected by the operation of certain acts of Congress. Personal property, indeed, of the Confederate States, or of one of them, became on capture by the Federal forces, the property *jure belli* of the United States. So the title to their real estate, occupied by the U. S. Army at some period of the war and held till its end, was completed in the United States by the subjection and dissolution of the hostile government, and became public property, subject to the disposition of Congress. But real estate of individual enemies (including private corporations), while subject to be sold, &c., under the act of July 2, 1864, could not in general

become vested in the United States except through the judgment of a competent court confiscating the same upon proceedings instituted under the act of July 17, 1862. As to the personal property of individuals, this (though in some instances made the subject of proceedings for confiscation) was mostly disposed of by and under the act of March 12, 1863, known as the "Captured and Abandoned Property Act," by which such property (except munitions of war and other material used or intended to be used in prosecuting the war against the United States, and which were of course subject to seizure by the army and became on capture the property of the United States) was required to be collected, sold, and the proceeds paid into the Treasury, subject to the claims therefor of parties who should establish their ownership of the property and the fact that they had not "given aid or comfort to the rebellion."<sup>1</sup> XVIII, 511, *February, 1866*; XIX, 162, *November, 1865*; XXIII, 90, *July, 1866*; XXVI, 160, *November, 1867*; XXVIII, 610, *May, 1869*; XXIX, 6, 364, *June and October, 1869*; XLII, 540, *March, 1880*; XLIII, 164, *January, 1880*.

660. *Held* that the property of enemies, captured *jure belli* in a civil war, did not belong to the class of property indicated in Art. V of the Amendments to the Constitution, the taking of which "for public use without just compensation" is prohibited. XXX, 231, *April, 1870*.

661. The owner of property captured *jure belli* is not entitled to recover its value under the provisions of Sec. 3483, Rev. Sts., as being property *impressed* in the military service.<sup>2</sup> XXXVIII, 476, *February, 1877*.

662. A loyal owner of property captured by the enemy during the civil war, and afterwards *recaptured* by the Federal forces, may have the same turned over to him by executive authority, where clearly identified as belonging to him, and should in general be allowed to receive it free from any charge in the nature of salvage.<sup>3</sup> I, 424, 428, 456, *November and December, 1862*; XI, 206, *December, 1864*; XX, 485, *March, 1866*.

663. *Held* that a civilian into whose hands had come, at the end of the civil war, certain captured personal property of the enemy, was not entitled to convert it to his own use, or to demand compensation

<sup>1</sup> See under this paragraph, *United States v. Puleford*, 9 Wallace, 531, 538; *United States v. Klein*, 13 *id.*, 128, 136; *United States v. Huckabee*, 16 *id.*, 414; *Hayercraft v. United States*, 22 *id.*, 81; *Lamar v. Browne*, 2 Otto, 187; *Williams v. Bruffy*, 6 *id.*, 176, 188; *Young v. United States*, 7 *id.*, 39, 66; *Ford v. Surget*, *id.*, 594; *Daw v. Johnson*, 10 *id.*, 158; *Porte v. United States*, *Devereux* (Ct. Cls.), 109; *Winchester v. United States*, 14 Ct. Cls., 13; *United States v. A Tract of Land*, 1 Woods, 475; *Atkinson v. Central Ga. Mfg. Co.*, 58 Ga., 227.

<sup>2</sup> As to the distinction between capture and impressment, see 11 Opins. At. Gen., 378.

<sup>3</sup> See *Wilson v. United States*, 4, Ct. Cls. 559.

as a condition of its surrender to the U. S. authorities. XXI, 479, *June, 1866.*

664. Sec. 218, Rev. Sts., in requiring the Secretary of War to collect, &c., "all such flags, standards and colors as are taken by the army from the enemies of the United States," is believed to have reference to the flags of the enemy. *So advised*, that a flag of a Massachusetts regiment, captured by the enemy, and retaken at the end of the war at Richmond, was not to be considered as one of the class placed by the statute under the charge of the Secretary of War, and might therefore properly be returned to the State or the regiment, if originally belonging to or furnished by the same. Otherwise, if furnished by the United States: in such case the flag is property of the United States disposable only by Congress. 58, 119, *February, 1893.*

665. Sec. 5586, Rev. Sts., authorizes the delivery to the Smithsonian Institution of certain kinds of property, to be delivered to such persons as may be authorized by the Board of Regents to receive the same. Upon a request from the secretary of the institution: that a small Spanish cannon captured in the trenches before Santiago, Cuba, by U. S. volunteers and brought by them to Washington, D. C., be assigned to the U. S. Museum at the institution, *held*, that the provisions of Sec. 5586 did not apply to the property named; that the same being public military stores captured from the enemy was property of the United States, and that the power to dispose of all property of the United States was exclusively vested by the Constitution in Congress. Card 5033, *September, 1898.*

666. All property captured from the enemy becomes the property of the United States subject to disposition by Congress. Where it inures to the benefit of individuals it is in consequence of a grant by Congress. But there is no act of Congress which extends to members of the army, regular or volunteer, the right to share in prize money resulting from captures by the navy of public or private vessels of the enemy, though the army may have aided in the operations which led to the capture. Card 5250, *November, 1898.*

CERTIFICATE OF MERIT.

667. *Held*, under Sec. 1216, construed in connection with Sec. 1285, Rev. Sts., that the President was authorized to grant a certificate of merit only to a soldier belonging at the time of the grant to a regiment of the army; that he was not empowered to grant such a certificate to a discharged soldier and civilian, on account of services rendered while he was a soldier.<sup>1</sup> XII, 168, *April, 1878.*

<sup>1</sup>See, to a similar effect, the opinion of the Attorney General in 16 Opins., 9; also the subsequent G. O. 28, Hdqrs. of Army, 1878.

**668.** *Held*, under Sec. 1216, Rev. Sts., as amended by the act of Feb. 9, 1891, c. 122, as follows: 1. A certificate of merit may now be granted to "any enlisted man of the army," noncommissioned officer as well as private.<sup>1</sup> 2. It may be granted for distinguished conduct prior to the date of the act of February 9, 1891, as well as since.<sup>2</sup> 3. The grantee must belong to a regiment. 4. While the recommendation of the regimental commander is necessary, this recommendation may be based upon any fact or facts deemed by him to justify it, such as the recommendation of the company commander, or any other officer (whether of the regiment or not) cognizant of the circumstances of the case, or upon any other authentic information brought to his (the regimental commander's) knowledge. 5. That the declaration of A. R. 177 (197 of 1901), that the recommendation "must originate with an eye witness," is an interpolation not authorized nor called for by the original statute (Sec. 1216, Rev. Sts.), or by the recent amendment of 1891, and an instance of *quasi* legislation unwarranted in an army regulation. 47, 152, *May, 1891*.

**669.** Sec. 1216, Rev. Sts., as amended by the act of March 29, 1892 (27 Stats., 12), provides "that when any enlisted man of the army shall have distinguished himself in the service the President may, at the recommendation of the commanding officer of the regiment or the chief of the corps to which such enlisted man belongs, grant him a certificate of merit." *Held*, that a retired enlisted man is an "enlisted man of the army" within the meaning of this statute and therefore eligible for a certificate of merit. The recommendation required should come from the commanding officer of the regiment or the chief of the corps to which such enlisted man belonged. Card 8445, *June, 1900*.

**670.** The law provides that a certificate of merit may be given to any enlisted man who "shall distinguish himself in the service." This is not limited to distinguished service in battle. *Held*, therefore, where an enlisted man distinguished himself by the part he took in subduing a fire which threatened to destroy public property, that he could legally be given a certificate of merit for such service. Card 4108, *May, 1898*.

**671.** The pay of general service clerks and messengers is *fixed* by the act of July 29, 1886. While this statute restricted them to cer-

<sup>1</sup> *U. Bell v. U. S.*, 28 Ct. Cls., 462, it was held that a soldier, to whom, when a member of an infantry regiment, had been granted a certificate of merit, was entitled to continue to receive the additional pay after re-enlisting in the "general messenger service."

<sup>2</sup> See *McNamara v. U. S.*, 28 Ct. Cls., 416, where it is held that the act of Feb. 9, 1891, is retroactive, and entitles the beneficiary to the additional pay from the date of the service for which the certificate was awarded.



tain pay as such clerks and messengers, it left unaffected their rights as enlisted men under Sec. 1285, Rev. Sts., as amended by the act of February 9, 1891, by which all enlisted men who have received certificates of merit are entitled to "additional pay" at the rate of two dollars per month. This "additional pay" is a mere gratuity and not pay, &c., in the sense of the above act of 1886, such pay, &c., being compensation for services rendered. *Held*, therefore, that a general service clerk or messenger, being an enlisted man, is entitled, when holding a certificate of merit, to the monthly merit pay, calculated from the date of the service for which he received his certificate. 59, 347, *May, 1893*.

#### CESSION OF JURISDICTION.

672. Jurisdiction over territory in a State may be acquired by the United States, under the 17th clause of Sec. 8 of Article 1 of the Constitution, by the purchase of such territory, with the consent of the State, "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." The Constitution gives Congress the power of exercising exclusive legislation over such place, and this is held to mean exclusive jurisdiction. The State's consent to the purchase for any one of these constitutional purposes invests the United States with exclusive jurisdiction, and the State can not, even by the express language of its legislation, reserve to itself any part of this jurisdiction. (The reservation of the right of serving process for causes of action arising outside such territory is not held to be an actual reservation of a part of the exclusive jurisdiction intended to be vested in the United States.) But it would seem that this is only true when the purchase is for one of the constitutional purposes. By correct construction, "other needful buildings" would mean buildings of the same character as those specified—buildings intended for military or defensive purposes. A more comprehensive meaning has, indeed, been sometimes given to the expression, but no justification for such construction is found. In Pinckney's draft of a constitution there was this clause: "To provide such dockyards and arsenals, and erect such fortifications, *as may be necessary for the United States, and to exercise exclusive jurisdiction therein.*" (This draft was submitted May 29, 1787.)

There was no corresponding provision in the Constitution reported by the committee of detail (August 6), but the committee of eleven, by report of September 5, recommended the adoption of the clause as it now reads, except that it did not have the words "by the consent of the legislature of the State." In the debate on the proposition, "Mr.



Gerry contended that this power might be made use of to enslave any particular State by buying up its territory, and that the *strongholds proposed* would be a means of awing the State into an undue obedience to the general government. Mr. King himself thought the provision unnecessary, the power being already involved; but would move to insert, after the word 'purchased,' the words, 'by the consent of the legislature of the State.' This would certainly make the power safe." (5 Elliot's Debates, 511.)

And in the Federalist (No. 43) it is remarked: "Nor would it be proper for the places on which the *security* of the entire Union may depend to be in any degree dependent on a particular member of it."

So Story remarks (Sec. 1224):

"The other part of the power, giving exclusive legislation over places ceded for the erection of forts, magazines, &c., seems still more necessary for the public convenience and safety. The public money expended on such places, and the public property deposited in them, and the nature of the military duties which may be required there, all demand that they should be exempted from State authority. In truth, it would be wholly improper that places on which the security of the entire Union may depend should be subjected to the control of any member of it. The power, indeed, is wholly unexceptionable, since it can only be exercised at the will of the State; and therefore it is placed beyond all reasonable scruple. Yet, it did not escape without the scrutinizing jealousy of the opponents of the Constitution, and was denounced as dangerous to State sovereignty."

And, as observed by Judge Seaman (*In re Kelly*, 71 Fed. Rep., 545, 549):

"The rule thus stated, whereby legislative consent operates as a complete cession, is applicable only to objects which are specified in the above provision, and can not be held to so operate, *ipso facto*, for objects not expressly included therein. Whether it rests in the discretion of Congress to extend the provision to objects not specifically enumerated, although for national purposes, upon declaration as 'needful buildings,' and thereby secure exclusive jurisdiction, is an inquiry not presented by this legislation (see 114 U. S., 541); and I think it can not be assumed by way of argument that such power is beyond question."

In *New Orleans v. U. S.*, 10 Pet., 662, 737, the opinion of the Supreme Court is expressed by Mr. Justice McLean, without dissent, as follows:

"Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the Federal government shall establish forts or other military works. And it is only in

these places, or in the Territories of the United States, where it can exercise a general jurisdiction."

And, in *U. S. v. Bevens*, 3 Wheat., 336, 390, the claim was urged that the words "other place" would include a ship of war of the United States lying at anchor in Boston Harbor, and bring it within the statute defining murder committed "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole jurisdiction of the United States;" but it was stated by the court, through Chief Justice Marshall, that "the construction seems irresistible that by the words 'other place' was intended another place of a similar character with those previously enumerated;" that "the context shows the mind of the legislature to have been fixed on territorial objects of a similar character." (See, also, *The Federalist*, No. 43, by Madison.)

Sec. 355, Rev. Sts., prescribes that no public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other building, of any kind whatever, until the \* \* \* consent of the legislature of the State in which the land or site may be to such purchase has been given. This section is in part based on the clause of the Constitution referred to, and in part not. The consent of the State to a purchase, given in order to satisfy the requirement of this section, would invest the United States with exclusive jurisdiction, if the purchase be for one of the Constitutional purposes; but the section provides for other purposes also, and as to these it would seem that a simple consent to the purchase (assuming that such consent, being for a purpose not falling under the clause of the Constitution, amounts to a cession of jurisdiction) would only carry with it so much jurisdiction as would be necessary for the purpose of the purchase. Probably this would be held to be concurrent jurisdiction. Taking into consideration the fact that States cannot, under any circumstances, interfere with the instrumentalities of the Government of the United States, it may, indeed, be questioned whether, even under this view, unnecessary precautions have not been taken in regard to the acquisition of jurisdiction; and, certainly, it cannot be presumed that a State intends to part with more of its sovereignty than is necessary. A consent to the purchase, under Sec. 355, Rev. Sts., if the purchase be for other than one of the purposes described in the clause of the Constitution, may, therefore, be accompanied with any limitations not interfering with an instrumentality of the Government of the United States.

The most common way of acquiring jurisdiction, however, is by the State's expressly ceding it to the United States. In such case the State may make similar limitations, and this even if the place be used by the

United States for one of the purposes mentioned in the clause of the Constitution. To bring the case under the clause there must be a purchase with consent.<sup>1</sup> Card 1953, *December, 1895*.

673. The mere fact of its being the *owner* of land situated within a State does not entitle the United States to exercise *exclusive jurisdiction* over the same or of offences committed thereon,<sup>2</sup> nor does the fact that the land has been duly *reserved* for military purposes confer such authority.<sup>3</sup> Where the United States is the proprietor of the land at the time of the admission of the State, it may obtain such exclusive jurisdiction, by expressly reserving the same to itself in the act of admission. Where this has not been done, or where the land has been purchased or otherwise acquired by the United States subsequently to the admission of the State, exclusive jurisdiction over the same can be vested in the United States only by an act of *cession* of such jurisdiction on the part of the State, or by the State's giving its *consent* to the "purchase" by the United States. See the terms of the provision of clause 17, sec. 8, Art. I, of the Constitution.<sup>4</sup> A mere consent by a State, through its legislature, to the "purchase" by the United States of land within its limits for any purpose covered by the clause of the Constitution cited is as operative for the purpose of vesting the exclusive jurisdiction as is an express cession of the same.<sup>5</sup> XLII, 514, 524, *March, 1880*; XLIII, 234, *February, 1880*.

674. Where a State statute, in consenting to the purchase by the United States of land within the State and ceding to the United States jurisdiction over the same, added that such jurisdiction should be exercised "*concurrently with*" the State, *held* that this qualification was subject to the objection that it amounted to more than the mere reservation (not unfrequent) of the right to serve upon the land legal process for acts done and crimes committed *outside* of the same, and should

<sup>1</sup> See *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S., 525, 530, *Chicago and Pacific Ry. Co. v. McMahon*, 114 U. S., 542, *Benson v. U. S.*, 146 U. S., 325, 331, *In re Kelly*, 71 Fed. Rep., 545, *In re Ladd*, 74 Fed. Rep., 31.

<sup>2</sup> *United States v. Stahl*, 1 *Woolworth*, 192, and *McCahon*, 206; *Ex parte Sloan*, 4 *Sawyer*, 330, 331, 332; *Clay v. State*, 4 *Kans.*, 49. Much less does the mere fact of its being the *occupant* of the land give it this authority—as where it occupies land as a camp. *United States v. Tierney*, 1 *Bend*, 571.

<sup>3</sup> See the first three cases cited in last note. The fact that the person against whom the offence has been committed—as the person killed in a case of alleged murder—is an employee of the United States, adds nothing to its jurisdictional authority. *Ex parte Sloan, supra*.

<sup>4</sup> That the term "exclusive legislation," employed in the Constitution, is equivalent to exclusive jurisdiction, or rather that exclusive jurisdiction is a necessary incident of exclusive legislation: see 6 *Opins. At. Gen.*, 577, 578; *United States v. Cornell*, 2 *Mason*, 60; *Ex parte Sloan*, 4 *Sawyer*, 330.

<sup>5</sup> See *United States v. Cornell*, 2 *Mason*, 60; 6 *Opins. At. Gen.*, 577, 578; 7 *id.*, 628, 629, *8 id.*, 30, 104, 387. A State may give such consent by a single general act, prospective in terms, and covering all cases of future purchases by the United States. Note, for example, the act of the legislature of Texas of April 4, 1871, remarked upon in the opinion of the Attorney General of April 10, 1878 (15 *Opins.*, 480).

therefore be regarded as inconsistent with a grant of exclusive jurisdiction to the United States over such land; <sup>1</sup> *further* that it so far qualified the consent given to the purchase as to make it at least doubtful whether, in view of the provisions of Sec. 355, Rev. Sts., the Secretary of War would be authorized to expend an appropriation which had been made by Congress for the erection of public buildings on the land. XLIII, 197, *February, 1880*.

675. But where a State statute, in ceding jurisdiction to the United States over certain lands purchased within the State by the authority of Congress as sites for public structures, added—"But the State reserves the right to execute process lawfully issued under its authority within and upon said sites," &c., *advised* that such reservation might properly be regarded as having the same effect as that indicated by Atty. Gen. Cushing in 8 Opins., 387, viz., as reserving merely the right to serve process *within* the lands for acts done and crimes committed *without* the same (so as to prevent them from becoming an asylum for fugitives from justice), and that the cession might therefore properly be accepted as sufficiently vesting in the United States the exclusive jurisdiction over the premises contemplated by the Constitution. XLII, 567, *July, 1866*; XLIII, 234, *February, 1880*; 27, 132, *October, 1888*.

676. The effect of the possession by the United States of exclusive jurisdiction over land in a State, occupied for public purposes, is practically to withdraw the persons stationed or residing within the same from the civil and criminal jurisdiction of the courts of the State, and from liability to the process of the same (except so far as may legally have been reserved by the State—see § 675 *ante*), as well as from taxation and other burdens of citizens of the State. On the other hand, such persons are not entitled to enjoy any of the privileges of such citizens, as the privilege of voting, of the use of the public schools,<sup>2</sup>

<sup>1</sup> See *United States v. Cornell*, 2 Mason, 60; *United States v. Davis*, 5 *id.*, 350; 6 Opins. At. Gen., 577, 578; 7 *id.*, 628, 634; 8 *id.*, 30, 102, 411, 417; 20 *id.*, 242, 298, 611.

<sup>2</sup> See, on this general subject, the following as the principal authorities: *Fort Lamy*—*enworth R. R. Co. v. Lowe*, 114 U. S., 525; *United States v. Travers*, 2 Wheeler C. C., 490; *Do. v. Tierney*, 1 Bond, 571; *Do. v. Stahl*, Woodworth, 192 and McCahan, 203; *Commonwealth v. Clary*, 8 Mass., 72; *Mitchell v. Tibbets*, 17 Pick., 298; *Opinion of Justices*, 1 Met., 580; *Statute*, Dimick, 12 N. Hamp., 191; *People v. Godfrey*, 17 Johns., 225; *Do. v. Lane*, 1 Edmunds, 116; *Commonwealth v. Young*, Bright, 302; *In re O'Connor*, 37 Wisc., 379; *Clay v. State*, 4 Kans., 49; *Painter v. Ives*, 1 Neb., 122; 6 Opins. At. Gen., 577; 7 *id.*, 628; 8 *id.*, 30, 102, 387, 418.

In this connection, note an opinion of the Attorney General of February 7, 1880 (16 Opins., 408), that whether a superintendent of a national cemetery can legally be required to work upon the public roads of the State (in compliance with a law of the State requiring all male citizens between certain ages to perform such work), must depend upon whether he resides upon land acquired by the United States over which the State has parted with its jurisdiction; that if the jurisdiction over the cemetery grounds within which the superintendent resides has been surrendered to the United States, he is exempt from such obligation.



&c. XXI, 567, *July, 1866*; XXXIII, 8, *March, 1872*; XXXIX, 151, *August, 1877*; Card 3521, *September, 1897*.

677. The law is settled that where consent to purchase has been given, or exclusive jurisdiction has been ceded, by a State to the United States, as to land of the United States situate within the State, the land is no longer a part of the State in a political or legal sense, and no taxes—poll tax, or State, county, town, or school tax, or other—can legally be imposed upon those lawfully commorant thereon. XLIX, 187, *July, 1885*.

678. A *cession of jurisdiction* by a State to the United States may be qualified or conditional, and cedes only so much as is specifically expressed.<sup>1</sup> But a *consent to purchase*, as the term is intended in the constitutional provision (Art. I, Sec. 8, cl. 17), conveys the whole or an exclusive jurisdiction. So, where a State legislature, in giving the consent to a purchase for a constitutional purpose, couples with it a condition or qualification inconsistent with the possession of an exclusive jurisdiction by the United States—as a condition that the State shall retain the same civil and criminal jurisdiction over persons and their property on the land that it has over other persons and property in the State or shall retain the right to tax persons living on the land and their property,—*held* that the jurisdiction is not such as is designed by the Constitution, and cannot legally be accepted by the United States.<sup>2</sup> 59, 159, 408, *April and May, 1893*; 63, 98, *December, 1893*; 64, 330, *April, 1894*.

679. It has repeatedly been held, and is now regarded as well settled law, that exclusive legislation and exclusive jurisdiction mean one and the same thing, and that where a State has ceded to the United States the right of exclusive legislation over a tract of land within the territorial limits of the State, a reservation to the State of concurrent jurisdiction is valid only so far as it is not repugnant to the exclusive jurisdiction of the United States. Thus where the act of the legislature provided that "the United States may enter upon and occupy any land which may have been or may be purchased, or condemned, or otherwise acquired, and shall have the right of exclusive legislation and concurrent jurisdiction together with the State \* \* \* over such land and the structures thereon, and shall hold the same exempt from all State, county and municipal taxation," it was *held* that the only legal effect of the "concurrent jurisdiction" therein reserved to the State was to admit of the service of civil and criminal process by the State upon the lands of the United States, and thus to prevent such

<sup>1</sup> See *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S., 525.

<sup>2</sup> See 8 Opins. At. Gen., 418.



places from becoming a sanctuary for fugitives from justice. L. 255, *May, 1886*; Card 1581, *July, 1895*.

680. The term "purchase," as employed in statutes, has been construed as embracing all the forms of acquiring title—including condemnation—except that by descent.<sup>1</sup> But in *Kohl v. U. S.*,<sup>2</sup> the Supreme Court say: "It is true the words 'to purchase' might be construed as including the power to acquire by condemnation, for, technically, purchase includes all modes of acquisition other than that of descent. But, generally in statutes, as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference." In a case, therefore, of certain lands in a State acquired by the United States by condemnation in the exercise of the right of eminent domain, *advised* that a special act of cession of jurisdiction be obtained from the State. 50, 474, *December, 1891*.

681. The term "or other public building of any kind whatever," used in Sec. 355, Rev. Sts., *held* to include the "observation towers," for the erection of which in the Chickamauga and Chattanooga National Park appropriations were made in the acts of August 5, 1892, and March 3, 1893. Cession of jurisdiction by the State is therefore requisite before the appropriation can legally be expended. 60, 30, *June, 1893*; 63, 60, *December, 1893*.

682. The term "or other public building," &c., as occurring in Sec. 355, Rev. Sts., *held* to include the *viaduct* at Rock Island for the construction of which appropriation was made by Congress by acts of 1889 and 1890.<sup>3</sup> The consent of the State of Illinois to the purchase of the site by the United States or cession of jurisdiction, is therefore requisite to the legal expenditure of the funds appropriated. 43, 454, *November, 1890*.

683. Sec. 355, Rev. Sts., in prohibiting the expenditure of public money, for the purpose therein mentioned, before the consent of the State to the purchase of the land is obtained, does not preclude the mere purchase itself. The land therefore may legally be paid for, and the title thereto acquired, in the absence of such consent.<sup>4</sup> 63, 1, *December, 1893*. Neither the constitutional provision (Art. I, Sec. 8, cl. 17) nor the statute (Sec. 355, R. S.) precludes the United States from acquiring the title to the land. 64, 330, *April, 1894*.

<sup>1</sup> 7 Opins. At. Gen., 114, 121; *Ex parte Hebard*, 4 Dillon, 380, 384; *Burt v. Mchls. Ins. Co.*, 106 Mass., 356, 364.

<sup>2</sup> 91 U. S., 367, 374.

<sup>3</sup> In 7 Opins. At. Gen., 114, Mr. Cushing treated the land acquired by the United States for the use of the Washington Viaduct as coming within the provisions of Sec. 355, Rev. Sts.

<sup>4</sup> See 10 Opins. At. Gen., 34, 39; 15 *id.*, 212, 213.

684. In view of the general rule of interpretation, that a statute is not to be construed as retrospective unless its language clearly shows that it was so intended, *held* that a general statute of 1891, giving the consent of the State of Louisiana to the purchase by the United States of land within the State for public purposes, was in effect prospective and did not apply to the purchase of the land at Jackson Barracks, made before the date of such act.<sup>1</sup> Moreover the Constitution of Louisiana of 1868 forbids the enactment of retrospective laws. XLV, 436, *September, 1882; L, 95, March, 1886.*

685. The deficiency appropriation act of March 3, 1899, authorized the Secretary of War "in cooperation with the Floyd Memorial Association," to cause to be erected over the remains of Sergt. Charles Floyd, a member of the Lewis and Clarke Expedition, a suitable monument near Sioux City, Iowa, and appropriated five thousand dollars for the purpose. *Held* that the act did not authorize or require the acquisition by the United States of the land upon which the monument was built; that it may be assumed that Congress intended that the monument should be cared for by the association and that the United States should be at no other expense than that of the appropriation for assisting in its construction. There is no statute which would prohibit the expenditure of this particular appropriation, if title to the site be not acquired by the United States; and in practice appropriations have frequently been expended in works of improvement where such title to the sites has not been obtained, especially in improvements of navigable waters and highways. The prohibitions of Sec. 355, Rev. Sts., are not viewed as applicable to the case under consideration. Card 7482, *March, 1900.*

686. The title of the United States to the lands at Fort Monroe, as ceded by the State of Virginia, being limited to the line of ordinary low-water mark, *held* in view of the provisions of Secs. 355 and 4661, Rev. Sts., that a cession of jurisdiction over the necessary soil under the water beyond low-water mark should be obtained from the State before the appropriation, made by the act of August 10, 1888, for the iron pier to be constructed at Fort Monroe, be expended. LIII, 328, *April, 1887.*

687. *Held* that the act of Congress granting to the West Shore R. R. Co. a right of way across a part of the military reservation at West Point, New York, did not operate to oust, as to such way, the exclusive jurisdiction over the reservation previously ceded by the State to the United States. It simply imposed upon the military authorities the duty of not interfering with the legitimate use of its right by the railroad company. 41, 457, *July, 1890.*

<sup>1</sup> Compare 15 Opins. At Gen., 480.

688. Residents on a military reservation over which exclusive jurisdiction has been ceded by the State to the United States are not entitled to the use of the public schools nor can they legally be taxed for their support. But if allowed to avail themselves of such schools, and they send their children to them, they cannot avoid paying such charge as the local authorities may impose in regulating admissions. Thus *held* that officers stationed at Fort Trumbull, Conn., were not exempt from paying the fee exacted by the City of New London in cases where parents elect to send their children to a school in a district different from that in which they reside. 62, 348, *November, 1893.*

689. In view of the surrender by the State of New York to the United States of exclusive jurisdiction over David's Island, a coroner of Westchester County, N. Y., would not be authorized to hold an inquest on the bodies of persons dying on the island; but *advised* that such coroner be permitted upon the Island to hold inquests on the bodies of unknown persons found washed upon its shores or floating in the neighboring waters. 36, 143, *October, 1889.*

690. The laws of a State regulating the use of the water of streams thereof for irrigation purposes are not operative on a military reservation over which the United States has exclusive jurisdiction. Thus where the creek had its source on such a reservation, *held* that parties residing on said creek outside the reservation had no legal rights under the laws of the State in the waters of the creek until the same left the reservation, but recommended that the proper commanding officer be directed to so regulate the use of the water on the reservation that there would be no unnecessary waste. Card 2453, *July and September, 1896.*

691. A State statute requiring a report of births and deaths to be made in response to a call from the State Board of Health does not extend to a military reservation in such State over which the United States has exclusive jurisdiction, but *remarked* that the information requested might be furnished as a matter of comity. Cards 1826, *November, 1895*; 3270, *June, 1897.*

692. *Held* that there was no occasion for a statutory provision ceding back, or requiring the ceding back of jurisdiction, by the United States to the State, when a military reservation was abandoned and turned over to the Interior Department under the act of July 5, 1884. Such provision has sometimes appeared, as in the act of Congress of March 3, 1819 ("authorizing the sale of certain military sites"), as also in some of the State acts ceding jurisdiction, in which the grant is expressly limited to the period during which the premises may be held for public uses by the United States. But such provisions are deemed unnecessary, the jurisdiction ceasing of itself with the use and

occupation of the land for the purposes for which it was granted. It is believed to be clearly inferable from the clause on the subject in the Constitution (Art. I, Sec. 8 cl. 17) that the State relinquishes its jurisdiction only for such term as the particular status subsists in contemplation of which it was ceded.<sup>1</sup> 43, 475, *November, 1890*.

693. Sec. 5391, Rev. Sts., provides that any offence committed in any place ceded to and under the jurisdiction of the United States, shall, where not specially made punishable by any law of the United States, be visited with the same punishment as is provided for such offence by the laws "now in force" of the State within which such place is situated. This provision, originally enacted March 3, 1825, was substantially re-enacted April 5, 1866. In 1832 it was ruled by the Supreme Court<sup>2</sup> that the provision of 1825 was "limited to the laws of the several States in force at the time of its enactment." And in recent cases, arising in Montana<sup>3</sup> and Colorado,<sup>4</sup> it has been held that the provision in Sec. 5391 did not apply to the offence because these States, with their laws, did not come into existence till subsequently to the date of the enactment of 1866. Thus the section (5391) is operative neither as to offences committed in States which entered the Union since 1866, nor as to those committed in States where, April 5, 1866, there existed no criminal statute providing for the punishment of the particular offence. A modification of the existing law is called for. This cannot be done by legislation adopting beforehand all the criminal laws of a State which shall be in force at the time of the criminal act, because that would be a delegation by Congress of its legislative power to the States. The re-enactment, from time to time, therefore, of Sec. 5391, or of a provision to a similar effect, *recommended*.<sup>5</sup> 57, 488, *February, 1893*; 61, 435, *September, 1895*; Card 3546, *September, 1897*.

#### CHARGE.

694. In our practice, unlike that of the English, a military charge properly consists of two parts—the technical "charge" and the "specification." The former designates by its name, particular or general, the alleged offence; the latter sets forth the facts supposed to constitute such offence.<sup>6</sup> VII, 600, *April, 1864*. There may be one or more

<sup>1</sup> See *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S., 525.

<sup>2</sup> U. S. v. Paul, 6 Peters 141.

<sup>3</sup> U. S. v. Barnaby et al. Fed. Rep., 20.

<sup>4</sup> U. S. v. Curran, cited in Ex. Doc. No. 14, H. R., 53d Cong., 1st sess.

<sup>5</sup> Sess. act of July 7, 1898, 30 Stat., 717.

<sup>6</sup> An accusation against an officer or soldier, not thus separated in form, would be irregular and exceptional in our practice, and, till amended, should not be accepted as a proper basis for proceedings under the code.



specifications to a particular charge. It is the office of the specifications to specify the particular acts done or omitted by the accused with time and place, which constitute the offences charged; each specification to set forth but one instance of offence. V, 612, *January, 1864*; 65, 373, *July, 1864*.

695. The same particularity is not called for in military charges which is required in indictments.<sup>1</sup> The essentials of a charge are: 1. That it shall be laid under the proper article of war or other statute. 2. That it shall set forth (in the specification) facts sufficient substantially to constitute the particular offence. These essentials being observed, the simpler, and less encumbered with verbiage and technical terms the charge is, the better, provided it be expressed in clear and intelligible English. However inartificial a pleading may be, it will properly be held sufficient as a legal basis for a trial and sentence, provided that the charge and specification, taken together, amount to a statement of a military offence either under a specific article or under the general article. No. 62. XVI, 551, *September, 1865*; XXVII, 524, *February, 1869*.

696. To charge a military offence as a violation of a certain article of war, naming it by its number, is regular and proper. When a statute or an article of war enacts that whosoever shall do a particular act shall receive a specified punishment, it thereby prohibits, by the strongest possible implication, the offence named. The prohibition is part and parcel of the statute or article - is, indeed, its essence—and the act committed is necessarily in violation of it, and is properly averred so to be. Denouncing a penalty or punishment for an offence is the legal language or mode for prohibiting it, and this language is so well understood as to have led to great uniformity in the use of the form in question. V, 77, *October, 1863*. See VII, 457, *March, 1864*.

697. Where an offence is clearly defined in a specific article, it is irregular and improper to charge it under another specific article.

<sup>1</sup> In regard to the proper form for a military charge, Atty. Gen. Cushing (1 Opines, 601, 603) says: "There is no one [form] of exclusive rigor and necessity in which to state military accusations." He adds further: "Trials by court-martial are governed by the nature of the service, which demands intelligible precision of language, but regards the substance of things rather than their forms." \* \* \* "The most bald statement of the facts alleged as constituting the offence, provided the legal offence itself be distinctively and accurately described in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate ground-work of conviction and sentence." So it is observed by Atty. Gen. Wirt (1 Opines, 276, 286) that "all that is necessary" in a military charge is that it be "sufficiently clear to inform the accused of the military offence for which he is to be tried, and to enable him to prepare his defence." And see Tyler, 209; Kennedy, 69. It is ably remarked by Gould (Pleading, p. 4) that "all pleading is essentially a logical process;" and that, in analyzing a correct pleading, "if we take into view, with what is expressed, what is necessarily supposed or implied, we shall find in it the elements of a good syllogism." But it can hardly be expected that military charges in general will stand this test.



So, where the article in which the offence is defined makes it punishable with a specific punishment to the exclusion of any other, it is error to charge it under an article, such as the 62d, which leaves the punishment to the discretion of the court. II, 51, *March, 1863*; XI, 312, *December, 1864*; XIV, 599, *June, 1865*; XX, 533, *April, 1866*; XXVIII, 575, *May, 1869*. On the other hand, it is equally erroneous to charge under a specific article, making mandatory a particular punishment, an offence properly charged only under Art. 62. I, 463, *December, 1862*; XXVII, 413, *December, 1868*. XXVIII, 575, *supra*.

698. For some time after the enactment in 1874 of the present new Articles of War, charges were not unfrequently laid under articles by their old numbers—as “violation of the 9th” (old number), instead of the 21st (new number) “Article,” or “sleeping on post, in violation of the 43th” (old number), instead of the 39th (new number) “Article.” *Id.*, in such cases, that the error was one which could only be taken advantage of by an objection in the nature of a plea in abatement—whereupon indeed an amendment could at once be made, and that, in the absence of such objection, the mistake was to be treated as immaterial after finding and sentence. XXXVII, 313, *February, 1876*; XXXVIII, 495, 552, *April, 1877*.

699. Where a specific offence is charged (*i. e.*, an offence made punishable by an article other than the general 62d article), and the specification does not state facts constituting such specific offence, the pleading will be insufficient as a pleading of that offence. Legal effect may, however, be given to a pleading if the charge and specification taken together amount to an allegation of an offence cognizable by a court martial under Art. 62. And in all cases—whatever be the form of the charge or specification—if the two are not inconsistent, and, taken together, make out an averment of a neglect or disorder punishable under this general article, the pleading will be sufficient in law and will constitute a legal basis for a conviction and sentence. XI, 491, *March, 1865*; XV, 680, *October, 1865*; XVI, 551, *September, 1865*.

700. It is illogical and faulty pleading to charge a secondary offence *in lieu of* the actual or principal offence, of which that charged was merely a consequence or incident. XXVII, 446, *January, 1869*. But where the act committed involves several distinct offences, the party may properly be arraigned upon the same number of separate charges. XXX, 489, *July, 1870*.

701. It is the established practice before courts-martial and military commissions to examine into as many accusations against the individual on trial, without regard to their connection with each other or their identity in respect to date or place, as it may be deemed proper and advisable by the prosecuting authority to adduce. The charges against

such a prisoner may be in number unlimited and as various in character as the jurisdiction of the tribunal will permit. XIV, 40, *January, 1865*. Undue multiplication, however, of charges, or forms of charge, is to be avoided: thus charges should not in general be added for minor offences which were simply acts included in and going to make up graver offences duly charged. XV, 441, *July, 1865*. It may, indeed, sometimes be expedient where the offences are slight in themselves, and it is deemed desirable to exhibit a continued course of conduct, to wait, before preferring charges, till a series of similar acts have been committed, provided the period be not unreasonably prolonged; but in general charges should be preferred and brought to trial immediately or presently upon the commission of the offences. Anything like an *accumulation*, or saving up, of charges, through a hostile *animus* on the part of the accuser, is discountenanced by the sentiment of the service.<sup>1</sup> XII, 348, *February, 1865*.

702. The prosecution is at liberty to charge an act under two or more forms, where it is doubtful under which it will more properly be brought by the testimony.<sup>2</sup> In the military practice the accused is not entitled to call upon the prosecution to "elect" under which charge it will proceed in such, or indeed in any, case. XXXIII, 306, *August, 1872*.

703. Where there are two sets of charges against an accused, they should if practicable be consolidated, and one trial be had upon the whole, instead of two trials, one upon each set. XXX, 265, *April, 1870*. But after the accused has been arraigned upon certain charges, and has pleaded thereto, and the trial on the same has been entered upon, new and additional charges, which the accused has had no notice to defend, cannot be introduced or the accused required to plead thereto. Such charges should be made the subject of a separate trial, upon which the accused may be enabled properly to exercise the right of challenge to the court, and effectively to plead and defend.<sup>3</sup> XXIV, 513, 577, *May, 1867*.

704. Such loose and indefinite forms of charge as "fraud," "worthlessness," "inefficiency," "habitual drunkenness," and the like, will be avoided by good pleaders. XIX, 280, *December, 1865*; XXVIII, 253, *December, 1868*. Such charges indeed, in connection with specifications setting forth actual military neglects or disorders (not properly chargeable under specific articles) may be sustained as equivalent to charges of "conduct to the prejudice of good order and military dis-

<sup>1</sup>See G. C. M. O. 71, Hdqrs. of the Army, 1870.

<sup>2</sup>For the purpose of meeting the evidence as it may transpire." State v. Bell, 27 Md., 675.

<sup>3</sup>As to the further objection to such charges, that the court would not be qualified to try them, under its oath, see § 226, *ante*.

cipline." But a charge of "worthlessness," with specifications setting forth repeated instances of arrests, confinements in the guard house, or trials and convictions of the accused for slight offences, *held* an insufficient pleading; such instances not constituting military offences, but merely the punishments or penal consequences of such offences. XXV, 664, *June, 1868*; XXVIII, 253, *December, 1868*; XXXIII, 169, 208, 281, 285, 345, 416, *July to October, 1872*. A specification averring a general incapacity induced by habitual intoxication, does not set forth a military offence. The accused in such a case should be charged with the acts of drunkenness committed, as separate and distinct instances of offence. XXXIII, 458, *November, 1872*; L, 469, *June, 1886*.

705. The specification should be appropriate to the charge. A charge of "conduct to the prejudice of good order and military discipline," with a specification setting forth a violation of a specific article, is an irregular and defective pleading, and so of course is a charge of a specific offence with a specification describing not that but a different specific offence, or a simple disorder or neglect of duty. XXIV, 198, *January, 1867*.

706. A mis-naming or mis-description of the rank of the accused in the specification should be taken advantage of by exception in the nature of a plea in abatement. Where not objected to, the error is immaterial after sentence, provided the accused is sufficiently identified by the plea, testimony, &c. XXXVII, 482, *April, 1876*. It is not essential to state in a specification the *full* Christian name of the accused, or other party required to be indicated. Only such name or initial need be given as will be sufficient unmistakably to identify the party. XXIV, 299, *February, 1867*.

707. Where a specification to a charge preferred by a superior against an inferior officer, instead of referring to the former in the third person, alleged that the accused addressed abusive language to "me," and committed an assault upon "me," without naming or otherwise indicating the subject of the abuse or assault, *held* that such a form, though supported by some of the English precedents, was not sanctioned by our practice, and that, on objection being made to the same by the accused, the court would properly either require that the specification be amended, or that, in incorporating the charge in the record, the name of the preferring officer be added. III, 429, *August, 1863*.

708. Where a specification alleged that the accused was absent without leave at various times between two dates, twenty days apart, *held*

that the same was defective and subject to exception as being *double*, each such absence being a substantive and distinct offence.' X, 471, *October, 1864*. But where the specification to a charge of violation of the 60th Article alleged the presentation by the accused of a fraudulent claim for rations furnished for recruits and also for lodgings furnished for the same recruits at the same time, *held* that the specification related to one transaction and was not therefore to be necessarily regarded as *double* or defective, in view of the liberal rules of pleading applicable to military charges. X, 392, *October, 1864*.

709. A specification, in alleging the violation of an order which has been given in writing, or of any written obligation—as an oath of allegiance, parole, &c.—should preferably set forth the writing *verbatim*, or at least state fully its substance, and then clearly detail the act or acts which constituted its supposed violation. III, 649, *September, 1864*.

710. The *time* and *place* of the commission of the offence charged should properly be averred in the specification in order that it may appear that the offence was committed within the period of limitation fixed by the 103d Article, and to enable the accused to understand what particular act or omission he is called upon to defend.<sup>2</sup> I, 463, *December, 1862*; V, 613, *January, 1864*. A reasonably exact allegation of the time is also important in some cases—especially those of desertion and absence without leave—in order that the accused, if subsequently brought to trial for the same offence, or, what is the same thing in law, for an offence included in the original offence, may be enabled (by an exhibition of the record) properly to plead a former acquittal or conviction of that offence. VII, 348, 515, *April, 1864*.

711. Where the exact time or place of the commission of the offence is not known, it is frequently preferable to allege it as having occurred "*on or about*" a certain date or time, or "*at or near*" a certain locality, rather than to aver it as committed on a particular day or between two specified days, or at a particular place. There is no defined construction to be placed upon the words "*on or about*" as used in the allegation of *time* in a specification. The phrase cannot be said to cover

<sup>1</sup> In the military, as in the civil, practice *double* pleading, i. e., specifications setting forth two or more, distinct offences—especially if chargeable under different articles of war—is properly condemned, and in sundry cases the conviction and sentence have been disapproved on account of the *duplcity* in law of the pleadings. See C. C. M. O., 80, War Dept., 1875; C. O. 3, 83, Dept. of the Missouri, 1863; do. 49, Dept. of the Ohio, 1864.

<sup>2</sup> As to the latitude allowable in the allegation of time in military pleadings, compare 1 Opins. At. Genl., 295, 296.

In the civil practice, "nothing is better settled than that proof of guilt is not confined to the day mentioned in the indictment. It may extend back to any period previous to the finding of the bill and within the statutory limit for prosecuting the offence." McBryde v. State, 34 Ga., 203.



any precise number of days or latitude in time. It is ordinarily used in military pleading for the purpose of indicating some period, as nearly as can be ascertained and set forth, at or during which the offences charged are believed to have been committed in cases where the exact day cannot well be named. And the same is to be said as to the use of the words "at or near" in connection with the averment of place. These terms "on or about" and "at or near" are, however, not unfrequently (though unnecessarily) employed in practice where the exact time or place is known and can readily be alleged. XXVI, 437, *February, 1868*.

712. The same exactness in the averment of time is in general scarcely required, where the offence charged is one of *omission*, as where it is one of the *commission* of a specific act. It is sufficient in the former case to allege that the offence occurred *between* certain named dates not unreasonably separated. XXX, 458, *July, 1870*. So, an offence of commission, which probably was not completed, or may not have been completed on any particular day, may be similarly charged. Thus *held* that the allegations of time and place were sufficient in a specification in which it was set forth that the offence charged (which consisted in an improper disposition of public property) was committed by the accused "while *en route* between Austin, Texas, and Waco, Texas, between the 5th and 25th days of May, 1867." XXV, 100, *September, 1867*. But where it was alleged in a specification that the accused was drunk on duty at some time or times during a period of seventy days, *held* that the specification did not give sufficient notice to the accused of the specific offence which he was required to defend, and was therefore uncertain and insufficient.<sup>1</sup> I, 463, *December, 1862*.

713. Where time or place is omitted to be averred, or is averred without sufficient definiteness, and the defect is excepted to by the accused on being called upon to plead, the court will properly direct that an amendment be made. But where in either such case no objection is interposed by the accused, the proceedings will be sufficient in law provided the time and place of the offence can be made out with reasonable certainty from the testimony in connection with the specifications.<sup>2</sup> XIV, 635, and XVI, 298, *June, 1867*; XX, 280, *January, 1866*; XXVI, 412, *January, 1868*. Where the offence is alleged to have been committed on a particular day, and the evidence shows that it was committed on quite a different day in such case, provided time is not of the *essence* of the offence and the specific act charged is suffi-

<sup>1</sup> Compare cases in G. O. 193, Army of the Potomac, 1862; do. 98, Dept. of New Mexico, 1862.

<sup>2</sup> See, to the same effect, G. O. 16, War Dept., 1853.



ciently identified by the other testimony, the variance between the allegation and the proof will not constitute a fatal defect, and need not induce a disapproval of the sentence where there has been a conviction. A return, however, of the record to the court, for correction, if practicable, would well be resorted to by the reviewing officer before taking final action. XIII, 361, *February, 1865*.

714. While it is in general irregular to plead matter of evidence, there is no objection to noting in brief in the specification the immediate result or effect of the act charged, as a circumstance of description illustrating the character and extent of the offence committed. Thus while a homicide, if amounting to murder, and capital under Sec. 5339, Rev. Sts., or by the law of the State, &c., cannot as such be made the subject of a military charge in time of peace (see §§ 91 and 148, *ante*), yet a capital homicide, where it has been committed in connection with or as a consequence of a specific military offence charged against the accused—as, for example, “Mutiny,” or “Offering violence to a superior officer.”—may properly be stated in the conclusion of the specification, as matter of aggravation and as indicating the *animus* of the accused or the amount of force employed. XXXIV, 478, *September, 1873*.

715. Properly to warrant the *joining* of several persons in the same charge and the bringing them to trial together thereon, the offence must be such as requires for its commission a combination of action and must have been committed by the accused in concert or in pursuance of a common intent. The mere fact of their committing the same offence together and at the same time, although material as going to show concert, does not necessarily establish it. Thus the fact that several soldiers have absented themselves together without leave, will not, in the absence of evidence indicating a conspiracy or concert of action, justify their being arraigned together on a common charge, for they may merely have been availing themselves of the same convenient opportunity for leaving their station. Nor is desertion, of which the gist is a certain *personal* intent, ordinarily chargeable as a *joint* offence.<sup>1</sup> V, 479, *December, 1863*; XII, 439, *June, 1865*; XXIV, 468, *April,*

<sup>1</sup> See G. O. 78, War Dept., 1872, issued by the Secretary of War in accordance with opinions, previously given, of the Judge-Advocate General.

But where two or more soldiers have in fact deserted together as the result of a concerted plan they may properly be jointly or severally charged with desertion, the specification in either case describing in proper terms a “desertion in the execution of a conspiracy.” See order prescribing maximum punishments, *Court-Martial Manual*, 1901, p. 49.

Where two or more soldiers have, as the result of a concerted plan, attempted to desert, they may properly be charged jointly or severally with conspiracy to desert, as well as an attempt to desert, to the prejudice of good order and military discipline.

In any case under the charge of desertion the fact of concert may be put in evidence as illustrating the *animus* of the act committed.

1867; XXXII, 254, 333, *February, 1873*; XXXIII, 211, 434, *October, 1872*.

716. Military charges, though commonly originating with military persons, may be initiated by civilians; indeed it is but performing a public duty for a civilian, who becomes cognizant of a serious offence committed by an officer or soldier, to bring it to the attention of the proper commander. So a charge may originate with an enlisted man. But, by the usage of the service, all military charges should be *formally* preferred by, *i. e.*, authenticated by the signature of, a commissioned officer. Charges proceeding from a person outside the army, and based upon testimony not in the possession or knowledge of the military authorities, should in general be required to be sustained by affidavits or other reliable evidence, as a condition to their being adopted. XVI, 423, *July, 1865*; XLI, 672, *August, 1879*; XLII, 202, *March, 1879*; 13, 231, *November, 1886*.

717. Any officer may prefer charges: an officer is not disqualified from preferring charges by the fact that he is himself under charges or in arrest. I, 467, *December, 1862*; V, 348, *November, 1863*; XVI, 68, *May, 1865*. Charges should be preferred to the authority empowered to convene the court for their trial. XLII, 202, *March, 1879*. The signing of charges, like orders, with the name of an officer, adding—"by the order of"—his commander, is unusual and not to be recommended. Charges, where not signed voluntarily by the officer by whom they are preferred, are, in practice, usually subscribed by the judge advocate of the court. XXXIV, 598, *November, 1873*; XLVII, 521, *September, 1884*.

718. In cases where charges preferred against an officer are apparently susceptible of a reasonable explanation, it is not unusual, especially where the charges are preferred by an inferior against a superior, to afford the officer charged an opportunity to make explanation before it be determined whether to bring him to trial. XX, 12, *October, 1865*.

719. In general, charges can regularly and properly be ordered to be tried, or transmitted for trial to the court, only by the authority of the officer convening the court, or that of his superior. An inferior to the convening officer cannot properly refer charges to the court for trial except under some specific or general authority received from that officer.<sup>1</sup> The mere fact, however, that a court has proceeded to the trial of charges, referred to it without due authority by a commander inferior to the one who convened the court, cannot affect

<sup>1</sup>This rule, though not always insisted upon in practice, has been repeatedly enjoined in express terms by department commanders. See, for example, G. O. 67, Dept. of Arkansas, 1861; do. 88, Dept. of Dakota, 1869; do. 8, Dept. of Texas, 1874.

the legality of the finding or sentence in the case. XXII, 502, *December, 1866*; XXVI, 167, *November, 1867*.

720. A withdrawal of charges constitutes no legal bar to their being subsequently revived and re-preferred. Charges, however, once formally withdrawn, will not in general properly be revived except upon new material evidence being obtained. XI, 202, *December, 1864*; XXVIII, 370, *February, 1869*. Charges once accepted as a sufficient basis for action, by the commander competent to convene a court for their trial, cannot properly be withdrawn except by his authority.<sup>1</sup> XXI, 36, *November, 1865*.

721. A list of the proposed witnesses is no part of the military charge, though such a list may properly be and is not unfrequently appended to a charge. In serving upon the accused a copy of the charges, it is not essential, though the better practice, to add a copy of the list of witnesses where one is appended to the original charges.<sup>2</sup> XXV, 350, *February, 1868*.

722. It is a reprehensible practice to allow charges to lie long dormant before being preferred. Charges should not be delayed but should be brought to trial as soon as practicable and while the evidence is fresh; a delay of five months being *remarked upon as* prejudicial to the administration of justice and unfair to the accused. 24, 283, *May, 1888*.

723. Charges, though prepared in the Office of the Judge-Advocate General, are not in practice signed by him. If not signed by the officer actually preferring them, they will properly be authenticated by the signature of the acting judge advocate of the department, or, preferably, by the judge-advocate of the court. XLVII, 521, *September, 1884*; 60, 257, *June, 1893*.

724. An objection that a charge is not signed should be taken at the arraignment—when the omission may be supplied by the judge advocate's affixing his signature. By pleading the general issue the accused waives the objection. 59, 258, *May, 1893*.

725. But, to be taken cognizance of by the court, it is not essential

<sup>1</sup> How far charges may be amended by the judge advocate before the organization of the court depends mainly upon his authority, general or special, to make amendments. See § 1532, *post*. After the arraignment, amendments of form may always be made with the assent of the accused or by the direction of the court, and so may slight amendments of substance not so modifying the pleading as to make it a charge of a new and distinct offence. An amendment so substantial as materially to modify the "matter" before the court, will not in general be authorized (see EIGHTY-FOURTH ARTICLE), and any amendment whatever of substance should be allowed by the court with caution and subject to the right of the accused to apply for a continuance. See NINETY-THIRD ARTICLE. As to the authority of the court or judge advocate to *strike out or withdraw* a charge or specification, see §§ 490, 1532, and 1797, *post*.

<sup>2</sup> Appending such a list does not preclude the prosecution from calling witnesses not named therein.

that a charge should be signed by any officer. If, though not so signed, it be duly officially transmitted by the convening commander, or other competent superior authority, to the court—either directly or through the judge-advocate—"for trial," or "for the action of the court," or in terms to such effect, it is sufficiently authenticated for the purposes of trial, and trial upon it may be proceeded with by arraignment thereon of the accused. LV, 369, *March, 1888*; XXX, 489, *July, 1870*; 59, 258, *May, 1893*; Card 3913, *April, 1898*.

726. A charge expressed in too general terms is faulty and imperfect: the accused is entitled to know for what particular act he is called to account. Thus a specification under Art. 62, in a case of an officer, which set forth, not a specific act of offence, but an habitual course of conduct as incapacitating the accused for service or for the performance of his proper duty, *held* seriously defective and subject to be stricken out on motion. For such conduct indeed the remedy is not by charge and trial but by retirement under Sec. 1252, Rev. Sts. L. 469, *January, 1886*.

727. A charge expressed in the *alternative*—either under Art. 17 or Art. 60—is irregular and defective, and, upon motion, may be stricken out or required to be amended. LI, 248, *December, 1886*; 297, *January, 1887*.

728. The order fixing maximum punishments prescribes different limits of punishments for wilfully and for negligently allowing (by an enlisted man) a prisoner to escape, as separate offences, under the 62d Article of war. A charge for suffering an escape under this Article should therefore indicate in the specification whether the act is alleged to be wilful or negligent only. 48, 220, *July, 1891*.

729. The allegation of *time* in a specification should be as nearly defined as the facts will permit; but where the act or acts charged extended over a considerable space of time, it may be necessary to cover such period in the allegation. Thus allegations of "from March to September, 1887," and "from May to October, 1888," have been countenanced in a case in which the accused was charged with the neglect of a duty the performance of which was thus continuous.<sup>1</sup> 31, 357, *April, 1889*.

730. A middle name or initial is no part of a person's name in law, and, except where it is necessary to identify the individual, may be omitted from the charge without affecting the validity of the finding or execution of the sentence. 34, 400, *August, 1889*. So, a misnomer in a charge, consisting of an erroneous middle name or initial, may be disregarded in a charge unless the accused moves to strike out or

<sup>1</sup> See G. C. M. O. 21, A. G. O. of 1889.



interposes an objection, in the nature of a plea in abatement, when he must also state his true name. The charge may then be amended accordingly in court, without delaying the proceedings. LII, 675, *October, 1887*.

731. A material amendment of a charge should properly be made before the actual trial. Where a court martial, after the trial was concluded, directed a specification to be amended so as to render it more definite as to time and place, and then caused the accused to be arraigned and to plead over again, *nunc pro tunc*, held that its action was without sanction of law or precedent. XLVIII, 315, *February, 1884*.

732. A failure, at the arraignment, to take notice of a variance between the form of a specification to which the accused is called upon to plead and such specification as it appeared in the copy of the charges served at his arrest, is a waiver of the objection, and the same cannot be taken advantage of at a subsequent stage of the proceedings. 64, 172, *March, 1894*.

733. The statement as to enlistments, discharges, &c., required, by the Army Regulations, to be furnished with the original charge to the convening authority, is not intended to be accompanied by a declaration, on the part of the commanding officer of the accused, as to his present character. The regulation does not call for the officer's opinion on the subject, or contemplate that the character of the accused will be taken into consideration at this time. 39, 459, *March, 1890*; 43, 10, *September, 1890*.

#### CHIEF MUSICIAN.

734. A "chief musician" is not an officer but an enlisted man (see act of March 3, 1869, c. 124, s. 5; and Sec. 1342, Rev. Sts.); and, not being (like a hospital steward or ordnance sergeant—par. 805, Army Regs. of 1863) specially exempted from trial by a regimental or garrison court, is subject to the same, for offences within the jurisdiction of such court, equally as to trial by a general court martial. XXXI, 212, *March, 1871*.

735. The chief musician of a regiment is an enlisted man, but not a non-commissioned officer. He is also enlisted, not to perform the duties of a soldier, but expressly as an "instructor of music." (Act of March 3, 1869, c. 124, s. 5; Secs. 1099, 1102, 1106, Rev. Sts.) So held that he could not legally be reduced to the ranks, either by sentence or by order.<sup>1</sup> XXXIII, 33, *May, 1872*.

<sup>1</sup> Compare now act of March 2, 1899, published in G. O. 36, A. G. O., 1899.



## CITIZENSHIP.

736. The mere enlistment and honorable discharge of an alien as a soldier of our army do not *per se* constitute him a citizen of the United States. He must still make formal petition to one of the courts, &c., specified in Sec. 2165, Rev. Sts., and present thereupon the evidence required by Sec. 2166.<sup>1</sup> LV, 167, *December, 1887*.

737. A native-born minor is a citizen of the United States under the XIVth Amendment of the Constitution. Card 181, *August, 1894*.

## CIVIL SUIT OR PROCESS—AMENABILITY OF MILITARY TO.

738. *Held*, on the analogy of the principle protecting an officer's pay from being taxed by the authorities of a State (see TAX), that the necessary and proper baggage of an officer travelling on duty, of not greater amount than allowed by the Army Regulations to be transported with him at the public expense, was properly exempt from attachment in a suit for a private debt. An officer, however, can not be allowed to claim such an exemption to an unreasonable extent, and should he assume to transport or procure to be transported with him any considerable amount of baggage greater than that permitted by the regulations, he would justly become liable to the consequences of the abuse of his privilege. In such a case he could not claim to be sustained by the government in resisting an attachment or execution levied upon his effects. XXXV, 481, *July, 1874*.

739. *Held* that the personal property of an officer required to be possessed and used by him in the regular performance of his military duties—as, for example, his sword, or, in a case of a mounted officer, his horse—could not legally be seized upon an attachment or execution issued in a suit brought in a State court. XXXIII, 8, *March, 1872*.

740. The legality of the service, at a military post, of process issued in a suit or prosecution instituted in a State court depends (as to its original authority) upon the question whether the sovereignty of the soil resides wholly in the United States (either by virtue of a reservation of the same by the United States upon the admission of the State, or of its subsequent surrender by the State) or is shared by the State government. Where, by an act of consent or cession of the legislature of a State in which a military reservation or post is situated, exclusive jurisdiction over the same has become unconditionally vested

<sup>1</sup>See act of Aug. 1, 1894, which prescribes that "in time of peace no person (except an Indian who is not a citizen of the United States, or who has not made legal declaration of his intention to become a citizen of the United States) \* \* \* shall be enlisted for the first enlistment in the army."

in the United States, as contemplated by Art. I, Sec. 8 cl. 17 of the Constitution, no process issued from the State courts can legally be served thereon, but only process issued from courts of the United States can be there executed. Where, however, in ceding jurisdiction, the State has reserved to itself the right, not unfrequently reserved under the circumstances (and which it is often for the advantage of the United States to have reserved, since otherwise the post might become an asylum for criminals see *CESSION OF JURISDICTION*) to serve within the premises civil and criminal process on account of rights accrued, obligations incurred, or crimes committed in the State but *outside* of the premises, then the writs of the State tribunals may be executed on the land in the class of cases thus excepted. Of course where there has been no cession of jurisdiction by the State, its officials have the same authority to serve the process and mandates of its courts, and its courts have the same jurisdiction over acts done and crimes committed within the military post as elsewhere in the State; the mere fact of the ownership or occupation of the land by the United States having no effect to except it from the operation of the State laws.<sup>1</sup> XVI, 514, *August, 1865*; XXI, 567, *July, 1866*; XXXIII, 8, *March, 1872*.

741. Where a military post or reservation is situated in a *Territory*, the Territorial courts are authorized to issue process for the arrest of officers or soldiers of the command charged with crime, or to cite them to appear before them as defendants in civil actions, or to attach, replevy upon, or take in execution any property belonging to them within the posts. &c., not specially exempted from legal seizure. This for the reason that the courts in which is vested the judicial power of a Territory are not the courts of a sovereignty distinct from the United States but are the creatures of Congress,<sup>2</sup> being established by it directly, or indirectly by its authority through the Territorial legislature, under the provision of the Constitution (Art. IV, Sec. 3, par. 2), empowering Congress "to make all needful rules and regulations respecting the Territory belonging to the United States." Thus while officials charged with the service of the process of such as indeed of any courts would, in comity, properly refrain from entering a military post for the purpose of serving process therein, or at least from making the service, till formal permission for the purpose had been sought and obtained from the commanding officer, yet, on the other

<sup>1</sup> See *CESSION OF JURISDICTION* and authorities cited.

<sup>2</sup> "A Territory is not properly sovereign. It is an organization through and by means of which Congress for a time governs a particular portion of the country. Its rights are those which are set forth in the organic act." (16 Opins. At. Gen., 114, 115.)

band, officers commanding military posts in the Territories should certainly interpose no obstacle to the due service within their commands of the legal process of the Territorial courts.<sup>1</sup> XXVIII, 1, *July, 1868*; XXXIX, 541, *May, 1878*.

742. When an officer or enlisted man has been arraigned before a duly constituted court martial for an offence legally triable by it, the jurisdiction thus attached cannot be set aside by a process of a State court; the jurisdiction of the latter being for the time suspended. The offender may of course be voluntarily surrendered by the United States.<sup>2</sup> 8, 484, *June, 1886*.

743. It is settled that a State court can have no authority to enjoin the United States judiciary from executing their judgments, or from proceeding with actions of law pending before them.<sup>3</sup> Similarly *held* that a State court was not empowered to enjoin an executive department or officer of the United States from performing the *contracts* of the United States, and, accordingly that an injunction issued in a suit in a State court prohibiting an officer of the army, charged with the duty of paying to a contractor a certain sum of money due him under a contract between him and the United States, from paying said sum, would legally and properly be disregarded by such officer.<sup>4</sup> XLII, 128, *January, 1879*.

744. Contracts were made with two different contractors to dredge separate designated subdivisions of the lake channel at Toledo, Ohio, and one of the contractors, by direction of the engineer officer in charge, began dredging in the subdivisions covered by the contract with the other. Whereupon the latter obtained an injunction from the State court enjoining said dredging. *Held* that while a State court was without power to enjoin a person working under the orders of an agent of the United States from making or completing an improvement for which Congress has made an appropriation,<sup>5</sup> the proceeding in

<sup>1</sup> See the opinion of the Judge Advocate General published in G. O. 30, Hdqrs. of Army, 1878, in connection with 7 Opins. At. Gen., 564. But see *contra*, *In re Charles Brown and Austin Burke*, on Habeas Corpus (September 1881), "In the District Court [Territorial] of the Second Judicial District, holding terms at Vancouver," published in Circular 21, Department of the Columbia, June 16th, 1885.

<sup>2</sup> 36 Opins. At. Gen., 423.

<sup>3</sup> *McKim v. Voorhes*, 7 Cranch, 279; *Duncan v. Darst*, 1 How., 306; *City Bk. of N. Y. v. Skelton*, 2 Blatch. 26; *Riggs v. Johnson Co.*, 6 Wallace, 106; *United States v. Council of Keokuk*, *et al.*, 514; *Mariposa Co. v. Garrison*, 26 How. Pr. 448; *English v. Miller*, 2 Rich. Eq. 320; *Clapin v. James*, 11 R. I., 86.

<sup>4</sup> See the subsequent confirmatory opinion of the Attorney General in this case, in 16 Opins., 257. In an earlier opinion of the Solicitor General (15 Opins., 524), it was held that as a State can not by its judicial process legally obstruct or indirectly interfere with the operations of the U. S. government a State court could not be authorized to enjoin a contractor with the United States from receiving payments under his contract and thus hinder him in the due performance of the same.

<sup>5</sup> *Wisconsin v. Duluth*, 96 U. S., 379.

question had no such purpose in view, did not in any way interfere with the improvement as contracted for by the United States, but simply prevented one contractor from infringing upon the rights of the other under his contract, that therefore the State court had jurisdiction of the case and power to enforce its decisions. 40, 313, *October, 1891*.

745. Where, in time of peace, a U. S. marshal of a Territory, under color of a formal warrant, made an arrest of a civilian, and an officer of the army thereupon assumed to release him by military force on the theory that the arrest had been made outside the marshal's district, *held* that the act of the officer was wholly unauthorized, and—an indictment having been found against him in a United States court—*advised* that he be required to surrender himself to the U. S. attorney or marshal for trial. XXVI, 468, *February, 1868*.

746. In a case in which, in 1873, a judgment was obtained in a Territorial court against two officers, for an act performed in good faith and in the zealous and conscientious discharge of what was believed to be a public duty devolved upon them by an order of the department commander, and this judgment was subsequently (in 1877) affirmed by the Supreme Court of the United States<sup>1</sup>—the officers having been defended by counsel assigned to defend them by the Department of Justice,—*advised* that, notwithstanding the fact that their act had been thus determined to have been illegal, an application made by them to Congress for an appropriation to defray the amount of the judgment, would properly be favored by the Secretary of War.<sup>2</sup> XLI, 433, *October, 1878*.

747. For criminal or tortious acts committed by soldiers against the property of citizens, the United States is not responsible.<sup>3</sup> The remedy is by prosecution of the individual offender, or suit for damages. 38, 319, *February, 1890*.

748. Enlistment in the regular army of the United States does not

<sup>1</sup> *Bates v. Clark*, 5 Otto, 205.

<sup>2</sup> By the acts of March 3, 1863, c. 81, s. 4; May 11, 1866, c. 80, s. 1; and March 2, 1867, c. 155, the order or authority of the President is made a defence in any court of the United States or of the States, to any prosecution or suit instituted against an officer or soldier of the army, for an arrest, trespass, or other act made or done by such authority, during the war of the Rebellion. Under these Statutes it would appear that an officer or soldier could not be made liable to punishment or damages for any legitimate act performed during the war in the line of his duty or under the orders of a proper superior; otherwise, however, as to injuries or wrongs done in the absence of legal orders, or on the personal responsibility of the individual. See, as illustrating this subject the decision of the Supreme Court in *Beard v. Burtis*, 5 Otto, 434.

In the case of *In re Murphy*, Woolworth, 141, it was held by Justice Miller that the act of 1867 was *ex post facto* and unconstitutional, in so far as it assumed to validate punishments imposed by military courts which would otherwise be invalid.

<sup>3</sup> See, on this subject, § 784, *post*, and notes.



preclude service upon the soldier of papers in a suit for divorce. Card 7413, *December, 1899.*

749. *Held* that the arrest of an enlisted man for a contempt in not complying with the legal order of a civil court to pay a certain sum for the maintenance of his wife, was a legal proceeding and not within the prohibition of Sec. 1237, Rev. Sts. Such an arrest is not an arrest "on mesne process" or "in execution for a debt," but an arrest on a judgment on conviction of a criminal offence,<sup>1</sup> analogous to an imprisonment duly adjudged on conviction of an ordinary crime or misdemeanor. 51, 475, *February, 1892.*

750. Where an enlisted man who had been served at his post (which was not under the exclusive jurisdiction of the United States) with a subpoena requiring his attendance as a witness before a civil court of the State, neglected to comply,—*held* that he was guilty of contempt, and, if fined by the court, had no remedy; and this though the service was personal and not made through the commanding officer. 35, 284, *September, 1889.*

751. A United States officer or agent, in charge of lands of the United States, who is made a defendant in a suit in a United States or a State court in which title to such lands is claimed by an individual, should duly appear and answer in court, and is not authorized to interpose physical force against the service of due process of the court in such a suit, however groundless he may believe it to be. So *advised* that the military force employed to protect the possession by the United States of a cemetery reservation at El Paso, Texas, to which title was claimed in a suit instituted by a citizen, be withdrawn, or at least ordered to obstruct in no manner the due execution of judicial process on the premises. 52, 182, *February, 1892.*

752. The owner of land occupied by a canal, constructed as an improvement under a River and Harbor Act, may, by the authority of the ruling of the Supreme Court in the leading case of *U. S. v. Lee*,<sup>2</sup> maintain an action of ejectment or trespass against the official representative of the United States in charge of the improvement. 35, 191, *September, 1889.*

753. *Held* that it was not within the constitutional power of Congress to enact that the United States should not be liable for damages caused by the prosecution of a public work, and therefore that the Government could not, through a provision of law to that effect, escape liability for losses incurred by third parties from flowage caused by a harbor improvement. If it would be liable to them in

<sup>1</sup> That contempt of court is "a specific criminal offence," see *New Orleans v. Steamship Co.*, 20 Wallace, 387, 392.

<sup>2</sup> 106 U. S., 196. And see the case of *Stanley v. Schwalby*, 85 Texas, 348.



the absence of such law, a statute providing that it should not be liable would be unconstitutional as being an attempt to deprive them of a property right by legislation. 56, 478, 485, *December, 1892.*

754. The legislature of the State of Washington passed an act, approved March 7, 1893, making unlawful and punishable by fine and imprisonment the manufacturing, buying or selling, or giving or furnishing to any one, of cigarettes or cigarette paper, which act has not (July, 1893) been judicially pronounced unconstitutional. *Held* that, so long as the same remained in force, an officer or soldier offending under it would be legally liable (unless his act were committed on premises under the exclusive jurisdiction of the United States) to arrest and punishment, and that a due consideration for the interests of the service, as well as a due respect for the State sovereignty, should induce military persons at a military post to avoid all cause or occasion of offence in the particulars made penal by this act. 60, 356, *July, 1893.*

755. It is not within the province of the War Department to afford to officers of the army protection against suits instituted by civilians claiming to be their creditors. 64, 63, *February, 1894.* Nor can the Government properly act as collector of private indebtedness due from officers or enlisted men of the army. In such cases resort should be had to the civil courts. Where, however, the question becomes one of conduct unbecoming an officer and a gentleman on the part of an officer or of conduct to the prejudice of good order and military discipline on the part of either an officer or enlisted man, action may be taken by the War Department on these questions only.<sup>1</sup> *Curds* 5482, *December, 1898; 5331, March, 1899.*

756. Where a soldier, sentenced to imprisonment in the Military Prison, was temporarily detained at a military post awaiting transfer to Leavenworth, and application was made by the civil authorities that he be turned over to them for a trial upon a criminal charge, *held* that he should be forwarded as soon as practicable to the Military Prison to serve out his sentence, and that the civil authorities should be respect-

<sup>1</sup>The Secretary of War does not undertake the collection of debts due private persons from officers and soldiers, nor to require a preference for any particular creditor in payment in such cases. His aim is to protect the character and standing of the army, and to eliminate from it those guilty of dishonorable conduct. Where charges of such conduct are made they will be promptly investigated, and where statements of non-payment of debts are made against officers, they will be investigated with this end in view. *Ruling, Secretary of War, November 18, 1897.*

Complaints of non-payment of debts due from officers on the active list and under the control of department commanders are in practice referred for the "necessary action" to the proper department headquarters and the complainants notified of the above ruling of the Secretary of War. The complaints need not be accompanied by or be in the form of formal charges—a statement of the acts and conduct complained of is sufficient as a basis for investigation. Formal charges can be prepared when as a result of the investigation such action is required.

fully informed as to his *status* and advised that proper facilities would be afforded them for assuming the custody of the prisoner immediately upon the completion of his term of imprisonment. 62, 338, *November, 1891.*

757. Where a man while serving as a juror enlisted in the army, *held*, that the War Department had no authority by reason of such enlistment to compel the judge to excuse him from further jury service. Card 4460, *June, 1898.*

758. In the case of *Belknap v. Schild* (161 U. S., 10), decided by the U. S. Supreme Court in February, 1896, it was held that where the United States owns a piece of property and is in peaceable possession of it, the Government cannot be enjoined by courts and prevented from using it for the government purposes for which it was intended. So where, after an electric plant had been constructed under contract at Watervliet Arsenal, suit was subsequently brought against the contractor by another electric company for infringement of its patent in the construction of the plant, making the commanding officer of the arsenal a defendant, asking for damages and that the latter be permanently enjoined from using the plant, *held* upon a request by the contractor for final payment, that in view of the decision of the Supreme Court cited, there was no objection to making the payment. Card 716, *April, 1896.*

759. The fact that a vessel lying at a wharf in Savannah, Ga., was a United States transport does not take a criminal offence committed thereon out of the jurisdiction of local courts. Whether as a matter of military necessity in time of war, such jurisdiction should be disregarded, it was unnecessary to consider, as no such necessity existed in the particular case. Card 5635, *January, 1899.*

760. On the question whether quartermasters on board U. S. transports can be summoned before a U. S. commissioner, on claims for pay made by seamen, *remarked*, that when an officer of the army is served with a summons from a United States court it is his duty to respond to the same; that this is recognized by the army regulations and has become the practice. *Recommended* therefore that this course be pursued in all cases instituted in the U. S. courts for seaman's wages, but the officer whose duty it becomes to make response to the summons should forthwith notify the proper U. S. district attorney of the institution of the suit and request him to defend the same, and at the same time report action to the War Department, by telegraph, if necessary, to the end that the Attorney General may be requested to give the district attorney any required instructions in the matter. Card 5647, *January, 1899.*

## CLAIM.

**761.** Under the law and practice governing the Executive Departments, a head of a department is held not to be in general empowered, without specific statutory authority for the purpose, to reopen (except for the correction of an error in calculation) a claim once duly settled by his predecessor, in the absence of new and material evidence clearly entitling the claimant to an additional allowance.<sup>2</sup> So *held*, that, in the absence both of new evidence and new statutory authority, the Secretary of War would not be empowered to reopen and reconsider a claim for the repayment of a certain sum (paid as commutation money by a party who claimed to have been illegally drafted), the question of the allowance of which had been duly considered by a former Secretary (under a statute authorizing him to repay the same if deemed to be justly due), and had been unfavorably determined, ten years before. And this, though the correctness of such determination was considered to be doubtful; the proper recourse of the claimant in such case being to Congress. XLII, 357, *July, 1879*.

**762.** As a general rule, a claim decided adversely by a former, can not be reopened by a later, Secretary, in the absence of new evidence going to the merits. 42, 413, *August, 1890*; Cards 687, *December, 1894*; 1408,

<sup>1</sup> The reason of the restricted authority (illustrated under this Title) of the Executive department in the allowance of claims may be found in the principle of public law, as expressed by Miller, J., in the case of *The Floyd Acceptances*, 7 Wall., 666, 676,—that "in our structure of government all power is delegated and defined by law \* \* \* we have no officers, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority."

<sup>2</sup> U. S. v. Bk. of Metropolis, 15 Peters, 377; *Rollins and Presbrey v. U. S.*, 23 Cl. Cls., 106, and cases cited; *Waddell's Case*, 25 *id.*, 323; 9 Opins. At. Gen., 32; 12 *id.*, 355; 14 *id.*, 275; 15 *id.*, 192; 16 *id.*, 452; 1 Comp. Dec. 193; 2 *id.*, 264, 401, 4 *id.*, 303; 6 *id.*, 236, 245. In *Rollins and Presbrey v. U. S.*, *supra*, it was held, quoting from syllabus, that "any public officer in an Executive Department may correct his own errors and open, reconsider, or reverse any case decided by himself." In delivering the opinion of the court, Chief Justice Richardson said: "It has long been held in the Executive Departments that when a claim or controversy between the United States and individuals therein pending has once been fully considered, and final action and determination had thereon by any executive officer having jurisdiction of the same, it can not be reopened, set aside, and a different result ordered by any successor of such officer, except for fraud, manifest error on the face of the proceedings, such as a mathematical miscalculation or newly discovered evidence, presented within a reasonable time and under such circumstances as would be sufficient cause for granting a new trial in a court of law. This ruling and practice of the Departments has been approved elsewhere and has been sustained by the courts. (9 Opins. At. Gen., 34; 12 *id.*, 172, 358; 14 *id.*, 275, 387, 456; 15 Pet., 401; *Lardette's Case*, 1 Cl. Cls., 147; *Jackson's Case*, 19 *id.*, 504; *State of Illinois Case*, 20 *id.*, 342; *McKee's Case*, 12 *id.*, 560; *Jay's Case*, 21 *id.*, 264, and the opinion of the Judiciary Committee of the Senate, reported by Senator and Judge David Davis, quoted in *Jackson's Case* above referred to.) But it has never been doubted that any public officer in the Departments may correct his own errors, and open, reconsider, and reverse in whole or in part any case decided by himself."

*June, 1895.* It is only for fraud, manifest error on the face of the proceedings (an erroneous calculation for example), or newly discovered evidence presented within a reasonable time and sufficient to warrant a new trial at law, that a claim or controversy, finally passed upon by a head of a department, may, in the absence of specific authority from Congress, be reopened by a successor. 34, 225, 357, *August, 1889*; 39, 23, *February, 1890*; 47, 223, *May, 1891*; 53, 443, *May, 1892*; 54, 462, *August, 1892*; 58, 109, *February, 1893*. But any public officer may correct his own errors and reopen his own decisions.<sup>1</sup> 34, 225, *August, 1889*.

763. A final settlement of a claim under special statutory authority, followed by receipt and acceptance by the claimant of the amount awarded, estops the claimant from questioning that such allowance and payment constituted a full and final satisfaction of his entire claim.<sup>2</sup> So where the Secretary of War, pursuant to act of Congress, had settled the claim of a railroad co. for military transportation by the allowance of a sum which was paid and accepted as a final award, *held* that without new authority from Congress, he could not reopen the case for the purpose of allowing further credits, except to correct errors in calculation. XLII, 332, *June, 1879*.

764. Where a claim has once been settled by a preceding Secretary under the provisions of a statute imposing such duty upon him, and subsequently a resolution is adopted by one house of Congress, or a committee thereof makes a report, adverse to the decision of the Secretary, such resolution or report may properly serve as a ground for reopening and again examining and settling the case; and while the views of the committee, or those indicated in the resolution, as to the meaning of the statute are entitled to respectful examination and consideration by the Secretary, they are not binding upon him in the reexamination and settlement of the claim. He must look solely to the statute which gave him jurisdiction and act according to his own best judgment of its meaning.<sup>3</sup> 56, 6, *October, 1892*.

765. An executive official cannot, of his own authority, appropriate the money of the United States for the purpose of satisfying a claim. So *held* that the Secretary of War could have no authority to reimburse a claimant for the amount of a tax assessed upon him by the military authorities during the war, and expended in the public service, whether

<sup>1</sup> See note to § 761, *ante*.

<sup>2</sup> 5 Opns. At. Gen., 122; 10 *id.*, 259; 12 *id.*, 386; 4 Comp. Dec., 328; 6 *id.*, 858. "Where a claimant has heretofore presented and has been allowed a claim for a part of an entire demand arising out of the same service and in the same right, such partial allowance is a settlement of the whole demand and a subsequent application for the remainder will be disallowed." 4 Comp. Dec., 328.

<sup>3</sup> 19 Opns. At. Gen., 388.



or not the same was legally exacted, but that Congress must be applied to for the necessary action.<sup>1</sup> XVIII, 668, *March, 1866*.

766. The Government will in general recognize assignments of claims to moneys in its hands due and payable to individuals, so far as to consent to pay over the amount to the assignee, where the assignment is made according to law, *viz.*, Sec. 3477, Rev. Sts.<sup>2</sup> But parties representing opposing interests cannot, by presenting to a head of a department conflicting claims to such money, compel him to become a stakeholder for them or an arbitrator upon the merits of their demands. Where there is any doubt as to whom the money should be paid, the claimants should properly have recourse to Congress or the courts. XIX, 266, *December, 1865*.

767. Where a claim for pay for military service, not yet allowed, had been won from the owner in a bet on a horse race, and a power of attorney to collect the same had been executed by the owner to the claimant, *held* that such power was, in effect, an assignment of the claim, and as such was—whether fraudulent or not—“absolutely void,” under Sec. 3477, Rev. Sts. LII, 95, *March, 1887*.

768. Notwithstanding the equitable principle that interest is an incident of a debt, the rule is well settled that, except where its payment is expressly stipulated for by contract, or specifically authorized by act of Congress, the United States is not bound, nor is any executive official empowered, to pay interest on claims, whether arising out of contract or otherwise.<sup>3</sup> XXI, 564, *July, 1866*; XXXII, 606, *May,*

<sup>1</sup>A claim, though deemed by the Secretary of War to be probably just, cannot in general, in the absence of any appropriation for its payment, or other authority to allow the same, properly be entertained by him. And where to pass upon a claim must be clearly quite futile, a consideration of its merits will in general be out of place, and the claimant, without being heard thereon, will properly be referred to the department of the government empowered by law to take specific action in his case.

<sup>2</sup>Assignments of claims not made as prescribed in this section are declared to be “absolutely null and void”; but this statute was intended to protect the Government and not the claimant and to prevent frauds upon the Treasury and the payment will be good as to him. *Price v. Forest* 173, U. S., 110, 123, and authorities cited. While the accounting officers will not approve powers of attorney not executed in accordance with the statute, if disbursing officers in fact make payments to persons holding unrevoked and undisputed powers of attorney, the accounting officers are compelled, under the decisions of the Supreme Court, to allow the disbursing officers credit for such payments in the settlement of their accounts. 1 Com. Dec., 142. See also, 2 *id.*, 295; 4 *id.*, 196; 6 *id.*, 101; 16 Opins. At. Gen., 261. This section, however, does not prohibit the passing of claims to heirs, devisees, assignees in bankruptcy, or even voluntary assignment for the benefit of creditors, because the passing or transfer of claims in such cases does not come within the evil at which the statute is aimed. *Erwin v. U. S.*, 97 U. S., 392; *Goodman v. Niblack*, 102 *id.*, 556; 2 Com. Dec., 50; 6 *id.*, 103. See also, 20 Opins. At. Gen., 578.

<sup>3</sup>*Angarica v. Bayard*, 127 U. S., 254, 260; *Harvey v. U. S.*, 113 *id.*, 243; *Tillson v. U. S.*, 100 *id.*, 43; *Todd v. United States, Devereaux* (Ct. Cls.), 95; *United States v. McKee*, 1 Otto, 450; 1 Opins. At. Gen., 550, 554, 2 *id.*, 463, 3 *id.*, 635, 4 *id.*, 14, 130, 286, 5 *id.*, 72, 105, 138, 334, 358; 6 *id.*, 533; 7 *id.*, 523; 9 *id.*, 57, 449; 14 *id.*, 30; 17 *id.*, 351.

In the absence of statutory authority, a military officer, in entering into a contract as the representative of the United States, should not stipulate with the contractor that, in case payments due him under the contract are delayed beyond a certain time, he will be entitled to claim interest thereon.



1872; 52, 427, *March, 1892*; 54, 464, *August, 1892*. So held that a State or Territory was not entitled to be allowed interest on the amounts found to have been expended by it in raising, arming, supporting, &c., volunteers, under the act of June 27, 1882; that act not making provision for any allowance of interest.<sup>1</sup> LI, 200, *December, 1886*; 420, *January, 1887*; LIII, 238, *March, 1887*.

769. Neither the Secretary of War nor any executive official can, without authority from Congress, be empowered to pay, allow, or favorably entertain an unliquidated claim or claim for an unsettled, undefined amount.<sup>2</sup> A claim for unliquidated damages, as such a claim is commonly designated, is a claim for an amount not fixed by an express contract or capable of being fixed by the terms of such a contract but based upon an alleged implied contract or an alleged wrong. 54, 386, *July, 1892*; 63, 180, 228, *January, 1894*; Cards 3627, *November, 1897*; 3969, *September, 1898*; 5573, *January, 1899*; 5901, *March, 1899*. Such claims, if within the description of the act of March 3, 1887, should be sued upon in the Court of Claims or U. S. district courts, which have been invested by that act with a concurrent jurisdiction of certain claims based upon implied contracts with the Government and "for damages liquidated or unliquidated." 20, 109, *October, 1887*.

770. The Secretary of War, in the absence of authority from Congress, is not empowered to allow a claim for *unliquidated damages*; the term "damages" being here used in its legal sense. In general, in the absence of a specific appropriation by Congress for the purpose, no executive or military officer can legally pay or allow to an individual a sum of money not expressly stipulated to be paid to him by the terms of a lawful contract. A claim for an amount not fixed by express contract, or capable of being fixed according to its terms, but based upon an alleged implied contract or an alleged wrong done the claimant, is a claim for unliquidated damages, and cannot legally be allowed, of its own authority, by an executive department of the government. Claimants for unliquidated damages must have recourse to Congress or, in a limited class of cases, to the Court of Claims. XXXII, 433, *March, 1872*; XXXV, 111, *January, 1874*; XXXVII, 233, *January, 1876*; XXXIX, 417, *February, 1878*; LIII, 279, *April,*

<sup>1</sup> Compare 17 Opins. At. Gen., 505.

<sup>2</sup> *Dennis v. U. S.*, 20 Ct. Cls., 119; *Brannen v. U. S.*, *id.*, 219; *Pitman v. U. S.*, *id.*, 253; 1 Comp. Dec., 261, 283; 2 *id.*, 174, 488; 4 *id.*, 446; 5 *id.*, 693, 770; 6 *id.*, 707. But payment may be made for work or materials furnished and received under a contract express or implied, though the price is not fixed by such contract. *McClellan v. U. S.*, 19 Ct. Cls., 179; *Dennis v. U. S.*, 20 *id.*, 119; *Pitman v. U. S.*, *id.*, 253; 1 Comp. Dec., 282; 2 *id.*, 365; 3 *id.*, 365, 505; 6 *id.*, 648, 953; 7 *id.* dated March 12, 1901. And where it is to the interest of the United States the Secretary of War may enter into a supplemental contract with a contractor, discontinuing an existing contract on payment to the contractor of a stipulated sum. *U. S. v. Corlies Engine Co.*, 91 U. S., 321; *Satterlee v. U. S.*, 30 Ct. Cls., 31; 3 Comp. Dec., 54; 6 *id.*, 953.

1887; 33, 46, *June, 1889*. Thus *held* that the Secretary of War was not empowered to allow a claim of a contractor for damages for the non-performance of a contract on the part of the United States, no such damages being stipulated for in the contract.<sup>1</sup> XXXII, 432, *March, 1872*. So *held* that the Secretary of War was not empowered, in the absence of statutory authority, to allow a claim for the use and occupation of buildings taken possession of and occupied by the military authorities without contract or agreement as to rent, or a claim for injury done to such buildings, but that the claimant must have recourse to Congress (or the Court of Claims) for his reasonable compensation. XXXVII, 534, *May, 1876*. Similarly *held* that the Secretary of War was not empowered to allow the claim of a citizen, who had been permitted to make certain improvements upon public land, to be indemnified on account of alleged injury to his property and business caused by the extending of the limits of a military reservation over the land occupied by him. XLII, 592, *April, 1880*. So *held* that the Secretary of War was not empowered (of his own authority and discretion) to allow a claim for indemnity for his alleged wrongful arrest and imprisonment as a deserter, made by a party who claimed to have been arrested by mistake for the real offender (XXI, 122, *December, 1865*; XXVI, 597, *June, 1868*); or a claim for his arrest and detention as a deserter made by a party claiming to have been illegally drafted (XIV, 405, *April, 1865*); or a claim for an alleged wrongful arrest and confinement made by a prisoner of state, or suspected person in time of war (XV, 129, *April, 1865*; XIX, 166, *November, 1865*; XXXVI, 522, *June, 1875*); or a claim for reimbursement by a military employee for loss of wages during a period of an arrest and trial by court martial, the conviction in his case having been held to be invalidated by reason of a defect in the proceedings (XIV, 225, *February, 1865*); or a claim for the value of personal property illegally appropriated by a soldier (XLII, 295, *May, 1879*); or a claim for the value of property taken or destroyed by the army during a war. XX, 603, *May, 1866*; XXXIII, 128, *July, 1872*.

771. And where the claims were for corn taken from a field and damage done to fences by U. S. soldiers encamped in the vicinity (Card 668, *November, 1894*); for damages to a crop by cavalry horses breaking into the field (Card 1553, *July, 1895*); for damage to a phaeton and harness caused by the runaway of a horse, caused by a stampede of U. S. cavalry horses (Card 2611, *September, 1898*); for damages done by U. S. troops to crops and fences in field manoeuvres and to lands used for drilling purposes, there being in the latter cases no contract express or implied by which the Government agreed to pay

<sup>1</sup> See 4 Opins. At. Gen., 327; 6 *id.*, 499, 516, 9 *id.*, 81, 14 *id.*, 24, 183

for the damages (Cards 4315, *June, 1898*; 4658, 4686, *July, 1898*; 4771, 4772, *August, 1898*; 5020, *October, 1898*); *held* that as the claims were for unliquidated damages, neither the Secretary of War nor other executive official could without statutory authority pay or allow the same.

772. Where a claim for damages on account of an alleged infringement by the United States of a patent was made, *held* that if the claim were substantiated by proof, it would be one for unliquidated damages, which the Secretary of War would not be empowered to pay without authority of Congress. Card 595, *November, 1894*, and *January, 1898*.

773. In the absence of legislative authority the Secretary of War cannot allow a claim for unliquidated damages directly nor can he allow it indirectly by entering into a supplemental contract to allow it. Thus where it was proposed by supplemental contract to compensate the contractor "for all losses arising from delays caused by the aforementioned modifications of plans and specifications and for all other claims of whatever nature arising under said original contract," *held* that this stipulation being for the payment of unliquidated damages the Secretary of War was without authority to bind the Government to the same.<sup>1</sup> Card 2275, *May, 1896*.

774. The declaration in the Vth Amendment to the Constitution, that private property shall not be taken for public use without just compensation, adds nothing to the authority of the Secretary of War to allow a claim for compensation for real or personal property taken for the use of the army or of his department. Congress alone (or in some cases the Court of Claims) can authorize the payment of the compensation here intended, and in the absence of authority from Congress, it would be quite beyond the province of an executive officer to assume to pass final judgment upon the merits of such a claim. XXXVII, 7, *January, 1875*.

775. *Held* that the provision of Sec. 3480, Rev. Sts., making it unlawful to pay certain claims against the United States to persons who promoted, &c., the late rebellion, created a personal disability only, which could not operate against the heirs of parties thus disqualified, unless they too participated in the rebellion. XXXIX, 417, *February, 1878*.

776. Without special authority for the purpose conferred by Congress, the executive branch of the Government cannot be empowered to pay any claims, in favor of the "loyal" owners, for property destroyed or captured by the enemy, or taken, destroyed, or damaged by the Federal troops, or appropriated for the use of the Federal army by the

<sup>1</sup> But see note to § 769, *ante*.

military authorities; or for land or buildings occupied for military purposes; or for land or property occupied or used in making fortifications or otherwise in the common defence—during the civil war, and in the absence of authorized express contract. Claims, however, of this class, where the taking or use of the property for a public purpose has been justified by a necessity of the service incident to a public emergency (and the officer making the seizure, &c., is thus relieved from being treated as a trespasser and made personally amenable in damages<sup>1</sup>), yet may, in view of the constitutional provision for the rendering of just compensation for private property taken for public use, be sued and recovered upon in the Court of Claims, where within its statutory jurisdiction. In such cases the obligation thus created "raises an implied promise on the part of the United States to reimburse the owner."<sup>2</sup> XX, 525, 598, *April and May, 1866*; XXII, 304, *August, 1866*; XXVI, 52, 242, *September and December, 1867*; XXXVI, 1, *February, 1874*.

777. As to the classes of claims for quartermaster's and subsistence stores authorized to be settled by the act of July 4, 1864 (as amended by subsequent acts,<sup>3</sup> and now incorporated in Secs. 300 A and 300 B, Rev. Sts.), it was *held* as follows:

(a.) That the term "*All claims of loyal citizens in States not in rebellion*" meant claims not only of "loyal" claimants but claims originating in States which were not in insurrection; and that if the claim did not so originate it was immaterial where the claimant resided or that the claim was meritorious.<sup>4</sup> XVII, 599, *February, 1866*; XIX, 338, *April, 1866*; XX, 318, 355, *January, 1867*; XXI, 19, 132, 243, 248, *November, 1867*, to *February, 1868*; XXXIII, 125, *July, 1872*. On the other hand, a claim originating in a State "not in rebellion" was *held* within the act, although the State or locality where it originated may have been at the time occupied by the enemy or the theatre of war. XXV, 621, *June, 1868*. *Held* further that the fact that the claimant was a foreigner (XXVI, 252, *December, 1867*), or a

<sup>1</sup>See *Mitchell v. Harmony*, 13 Howard, 115; *United States v. Russell*, 13 Wallace, 623; *Parham v. The Justices*, 9 Ga., 341; *Griffin v. Wilcox*, 21 Ind., 380; *Clark v. Mitchell*, 64 Mo., 567.

<sup>2</sup>*United States v. Russell*, 13 Wallace, 630. In view of the great number of claims of "loyal" persons for compensation for property appropriated or destroyed during the civil war, Congress from time to time made special provision for the investigation and allowance of certain claims of this nature;—as by the act of July 4, 1864; the "Captured and Abandoned Property Act," of March 12, 1863, authorizing the recovery of the proceeds of certain property seized and sold; and the act of March 3, 1871, s. 2, establishing the "Southern Claims Commission."

<sup>3</sup>As to the effect of the amendment by the act of Feb. 18, 1875, see 15 Opins. At. Gen., 35.

<sup>4</sup>See the construction of the act of 1864 by Congress in the subsequent act of Feb. 21, 1867; also Circular No. 51, of the War Department of 1865 and 12 Opins. At. Gen., 362, 497.



woman or noncombatant (XXI, 464, *June, 1866*), or an eleemosynary corporation (XXX, 475, *July, 1870*), could not entitle the claim to be entertained, if it did not arise in a "loyal" State. But *held* that the claims of officers or soldiers (as well as sutlers employed with the army) could not be debarred by the act, since such claims could not be said to have any locality of origin other than in the army itself. XXII, 177, *May, 1866*; XXIII, 485, *May, 1867*; XXIV, 495, *April, 1867*; XXVI, 62, *October, 1867*; XXXIII, 523, *November, 1872*. So *held* that the act did not preclude the entertaining of claims of "loyal" members of the Cherokee nation, for property taken for the use of the army in the territory occupied by such nation. XXX, 20, *July, 1869*. And *held* in a case of a claim for "quartermaster's stores" arising in a "State in rebellion," that the fact that the claimant, a resident of such State, had since been pardoned by the President did not entitle his claim to be entertained under the act; the pardon dispensing indeed with the necessity of proving loyalty,<sup>1</sup> but not otherwise modifying the status of the claim under the statute. XXVI, 160, *November, 1867*:

(b.) That the term "quartermaster's stores" did not include *rent*, or the use and occupation of land or buildings, by the army.<sup>2</sup> XVII, 599, *February, 1866*; XVIII, 506, *January, 1866*; XIX, 428, *February, 1866*; XXVI, 51, *September, 1867*; XXVIII, 159, *October, 1868*; XXX, 433, 473, *July, 1870*; XXXIII, 127, *July, 1872*; XXXVII, 6, *January, 1875*. And *held* that a claim for rent, or damage to real estate, could not be entertained under the act, although the premises were in fact restored to the claimant as owner at the close of the war (XXVI, 454, *February, 1868*); or though rent had in fact been paid by a military subordinate, through ignorance or misconception of the law, for a portion of the period of the occupation (XXVIII, 159, *supra*); or though a contract for rent had in fact been entered into, if such contract was not an express written contract, duly approved and legally valid.<sup>3</sup> XXX, 434, *June, 1870*. *Held* further that claims for cotton (XXVI, 247, *December, 1867*), and for lumber (XXVI, 331, *January, 1868*), seized in the enemy's country and used to strengthen fortifications could not be regarded as "quartermaster's stores." And so *held* of liquors taken for the use of the medical department of the army in North Carolina, in 1865. XX, 568, *April, 1866*:

(c.) That the term "proper officer" was not to be construed as intend-

<sup>1</sup> *United States v. Klein*, 13 Wallace, 128; *Armstrong v. United States*, *id.*, 154.

<sup>2</sup> See 12 Opine. At. Gen., 486, 488, also the *proviso*, derived from the act of Feb. 21, 1867, added to Secs. 300 A., and 300 B., Rev. Sts.

<sup>3</sup> And see *Filor v. United States*, 9 Wallace, 445.



ing necessarily an officer of the Quartermaster or Subsistence Department, but that it properly included any commander or other officer warranted under the circumstances of the case in receiving or taking the stores. XXI, 79, *November, 1865*.

(*d.*) That the proviso—"if convinced \* \* \* of the loyalty of the claimant," in connection with the rest of the statute, made the Quartermaster General or Commissary General of Subsistence, the exclusive judge on the question of loyalty in each case. XXXI, 352, *April, 1871*. And *held*, further, that the act devolved the function, of examining and reporting upon the claims specified, on the Quartermaster General and Commissary General as public officials of the United States rather than in their military capacity; and that their action under the statute was therefore final and not subject to review by a military superior or the Secretary of War. XXXVII, 554, *May, 1876*; XLIX, 328, *September, 1885*; 33, 235, *June, 1889*.

(*e.*) That, in view of the condition—"and if convinced \* \* \* that the stores have actually been received, or taken, for the use of, and used by, the army," no claim could be entertained for articles not actually procured for a legitimate military use and actually used accordingly; thus, that claims for animals or other property taken for personal use or profit by soldiers, camp-followers, &c., could not be entertained under the act. XIX, 533, *March, 1866*; XXI, 79, *November, 1865*; XXIV, 503, *May, 1867*; XXVII, 166, *September, 1868*; XXVIII, 56, *August, 1868*.

(*f.*) That the proviso at the end of the act (Rev. Sts. § 300 B.) authorizing the extension of its provisions to certain places included in the "States in rebellion," could not be extended to any localities not thus specified, or to parts of insurrectionary States excepted by proclamations of the President from the operation of certain special restrictions but not from the status of being in insurrection—as the parishes of Louisiana referred to in the proclamation of Jan'y. 1, 1863, or the port of New Orleans as affected by the proclamation of April 2, 1863. XVII, 607, *February, 1866*; XX, 399, 558, *February and April, 1866*; XXI, 243, *February, 1866*; XXII, 293, *July, 1866*; XXXVII, 5, 71, *January and October, 1875*.

778. Where certain cotton was accidentally destroyed by fire during the possession, by the military forces, of Mobile, Ala., in 1865, *held* that the owner was without legal claim against the United States. For injuries to, or destruction of, personal property, incidental to legitimate military operations in war, the Government is not responsible,<sup>1</sup> and the settlement of such claims arising during the civil war was spe-

<sup>1</sup> 1 Opins. At. Gen., 255; U. S. v. Pacific Railroad, 120 U. S., 227, 230.

cially inhibited by the act of February 21, 1867, c. 57. LV, 328, *January, 1888.*

**779.** A Spanish vessel was captured by the army in the harbor of Ponce, Porto Rico, at the time of the landing of the U. S. troops at that place, and was detained and used by the U. S. military authorities. The captain of the vessel subsequently made claim for damages on account of such detention and use. *Held*, that the claimant was not legally entitled to compensation for the seizure, use and detention of, or for damages to the vessel, as it was private property belonging to the enemy and seized in a hostile country by way of military necessity for the benefit of the army of the United States. Card 6046, *March, 1899.*

**780.** Where a claim was made by the owner for damage to a dwelling house "by a shell fired from an American warship on or about the fifth of July, 1898, during the bombardment" of Santiago, *held*, that the United States was not legally liable for the claim.<sup>1</sup> Card 5619, *January, 1899.*

**781.** Claims for property taken from loyal citizens for the use of the Union army during the civil war were taken cognizance of by the Southern Claims Commission; but this commission by an act of June 15, 1878, was brought to an end March 10, 1880. Such claims, except in certain special cases, were excluded from the jurisdiction of the Court of Claims, and the general statute of six years' limitation would exclude from its jurisdiction any such claims accruing at dates prior to that period; nor has the Secretary of War authority to allow such claims. The only means of relief which could now be afforded in such cases would be by express legislation of Congress.<sup>2</sup> 61, 468, *October, 1893*; Card 2764, *November, 1896.*

**782.** Where a paymaster of the army seeks to be relieved from liability for public funds stolen when in his charge, he should credit himself in his account current with the amount, and this credit being disallowed at the Treasury, he will have the recourse of an application for relief to the Court of Claims under Sec. 1059, Rev. Sts. It has been ruled by the Supreme Court<sup>3</sup> that, until the disbursing officer has been "held responsible" by the accounting officers, his right to have recourse to the Court of Claims does not accrue. 51, 439, *January, 1894.*

**783.** The United States is not responsible for unlawful acts of its soldiers or employees, and the Secretary of War is not empowered to allow a claim for personal property stolen or illegally appropriated by a sol-

<sup>1</sup> See U. S. v. Pacific R. R., 120 U. S. 227, and authorities cited.

<sup>2</sup> See Sec. 1059, Rev. Sts., and act of Mar. 3, 1887, (24 Stats., 505).

<sup>3</sup> U. S. v. Clarke, 96 U. S., 37.

dier. 1411, 279, *April, 1887*; 33, 165, *June, 1889*. So *held* that the United States was not liable to a citizen for the value of timber cut on his land by soldiers, wrongfully but in ignorance that the land belonged to claimant, even though such soldiers were at the time engaged in the discharge of official duties. The remedy in such a case is a suit against the individuals who committed the trespass or an application for relief to Congress. 39, 319, *February, 1890*.

784. It is well settled that the United States is not legally responsible for the torts of its officers or agents, whether of commission or omission.<sup>1</sup> Thus, where the claims were for personal injuries inflicted upon citizens by U. S. soldiers (Cards 5108, *October, 1898*; 6100, *March, 1899*; 6586, 6642, *June, 1899*); for aid in supporting the wife and children of a citizen killed by a soldier (Card 5261, *November, 1898*); for damages on account of injuries resulting from accidental shooting of a citizen by a soldier (Cards 5260, *November, 1898*; 5983, *March, 1899*); for damages to railroad train equipment by soldiers travelling thereon (Card 5433, *December, 1898*); for damages on account of injury received while a contract nurse on a U. S. transport and due to alleged negligence of officials of the Government (Card 6641, *June, 1899*); *held* that the Government was not legally responsible.<sup>2</sup>

785. Two native women of Porto Rico received gun shot wounds, the accidental result of a shot fired by a U. S. soldier who at the time lawfully fired the same while attempting to arrest another party; they submitted claims for damages. *Held*, that the United States was not legally liable therefor whether or not there was negligence on the part of the soldier. But as these claims were of a class for which Congress sometimes makes compensation, and as the military authorities were exercising all the powers of government in the Island of Porto Rico, *advised* that compensation for the injuries could legally be made from the revenues of the island. If made however in the form of an annuity it would remain operative during the continuance of the military government only. Card 6642, *June, 1899*.

786. A soldier, though become by discharge a civilian, has no claim against the United States for pay, in the nature of damages, for a

<sup>1</sup> *Pitman v. U. S.*, 20 C. Cls., 255, *Cibbons v. U. S.*, 8 Wall., 269, *id.*, 7 C. Cls., 105; *Morgan v. U. S.*, 14 Wall., 541.

Judge Story in his work on agency, § 319, says, "It is plain that the Government itself is not responsible for the misfeasances or wrongs or negligences or omissions of duty of the subordinate officers or agents employed in the public service, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests."

<sup>2</sup> While the Government is not pecuniarily responsible for torts committed by officers and enlisted men, the latter are so responsible and aside from their liability to civil suit may and should in cases covered by the 54th A. W. be proceeded against as required by that article.

period during which, though innocent in fact, he was detained awaiting trial for a military offence and action on the proceedings. 42, 375, *August, 1890*. So, where a civilian, arrested on reasonable grounds of suspicion that he was a deserter from the military service, was detained in confinement at a military post till it was ascertained that he was not such, *held* that he had no legal claim for damages against the United States. 43, 145, *October, 1890*.

787. Where in the course of the transportation by railroad, at Government expense, of an officer's allowance of personal baggage, the boxes containing the same were broken into and a portion of the property was stolen, *held* that the remedy of the officer was against the railroad company, not against the United States. The United States does not make itself an insurer in such a case; nor can the officer require the United States to sue the company in damages, for this could be done only on the theory that the United States was responsible to the officer for the value of property lost by no fault or negligence of its own. XLIX, 572, *December, 1885*.

788. A certificate of pay, as due on a final statement, was erroneously given by his commanding officer to a soldier, to whom there was in fact no pay due. The soldier endorsed the certificate for collection to a bank, by which it was endorsed for the same purpose to another bank. This bank presented it to a paymaster who paid it. On discovery of the error, the amount was stopped against the paymaster. The second bank then refunded to him the sum paid, and made claim for it upon the War Department. *Held* that such bank had no legal claim upon the United States, but that its recourse was properly against the first bank. 35, 447, *October, 1889*.

789. Sec. 1304, Rev. Sts., applies only to claims for relief from accountability on the part of actual officers of the army, and cannot be extended to a case of such a claim made by a person formerly in the army but long become a civilian. 65, 137, *May, 1894*.

790. Where a claim was made for compensation for time, cost, and expenses incurred in going from Brooklyn, N. Y., to Governor's Island, N. Y., to collect fees due as a civilian witness before a court-martial, *held* that there was no provision of law for the payment of such a claim. Card 1807, *November, 1895*.

791. There is no law authorizing the Executive department of the Government to pay claims for damages on account of injuries received by persons employed in the construction of public buildings, or in river and harbor improvements, and in the absence of such a statute the Executive department is without power to pay them. Cards 366, *September, 1894*; 2082, *February, 1896*.



792. A joint resolution of Congress approved Feb. 23, 1887, provides "that all per diem employes of the Government on duty at Washington or elsewhere shall be allowed the day of each year which is celebrated as 'memorial' or 'Decoration Day,' and the Fourth of July of each year, as holiday and shall receive the same pay as on other days." A per diem employe of the Government at West Point, N. Y., having been refused pay for the Fourth of July, submitted a claim therefor. *Held*, that under the joint resolution quoted, the claim was a valid one, that the resolution was not limited as to place to the city of Washington nor as to per diem employes to permanent ones. 61, 125, *August, 1893*.

793. An officer stored his household effects in a Quartermaster storehouse at Washington Barracks, D. C., and while so stored a portion of the property valued at \$350 was stolen. *Held*, on a claim for reimbursement, that the United States was not legally responsible for the loss. Card 6690, *July, 1899*.

794. Where a claim was made by a citizen of the United States for the apprehension of a deserter on Mexican soil, *held* that the claim should not be entertained on the ground that the arrest was an illegal one, and that an act done in violation of law can not be made the basis of a legal claim.<sup>1</sup> 23, 140, *March, 1888*.

795. A claim was made against the United States by an attorney for services rendered as counsel for an accused officer in a court-martial trial. *Held* that the claim was without merit as against the United States, and that the Government had nothing whatever to do with its payment. 32, 165, *May, 1899*.

796. A contract nurse who lost private property by the sinking of a U. S. hospital ship submitted a claim for the amount of the loss. *Held*, that such claims could not be paid by the War Department without special authority from Congress; and if it was desired to pay them, legislation authorizing it should be obtained. Card 5215, *November, 1898*.

797. The board of animal inspectors at Honolulu, appointed under a statute of Hawaii, submitted a claim for inspecting cavalry horses and draft mules of the United States, amounting to the statutory fee. *Held* that the claim was in effect a tax by the Territory of Hawaii on the operations of the Government of the United States; that the instrumentalities and agencies of such government are exempt from local taxation; and that therefore the claim could not legally be paid. Card 5554, *December, 1898*.

<sup>1</sup>See *Clay v. U. S.*, Devereux (Ct. Cl.), p. 25



## CLERK—FOR COURT MARTIAL.

798. A court martial, member of court, or judge-advocate cannot of course lawfully communicate to a reporter or clerk, by allowing him to record the same or otherwise, the finding or sentence of the court. Before proceeding to deliberate upon its finding, the court should require the reporter or clerk, if it has one, to withdraw. But the fact that the finding or sentence, or both, may have been made known to the reporter or clerk of a court martial, cannot affect the validity of its proceedings or sentence.<sup>1</sup> V, 478, *December, 1863*; XI, 318, *December, 1864*; XXVIII, 146, *October, 1868*; XLII, 218, *March, 1879*.

799. *Held* that a claim by an officer to be allowed extra compensation for services rendered by him as clerk to a general court martial of which he was the junior member, was wholly without sanction in law or regulation. XXII, 578, *February, 1867*.

## CLERK—OF WAR DEPARTMENT.

800. Under the provision of sec. 4 of the act of March 3, 1883, relating to absences of clerks of the departments, such a clerk, when absent without leave, whether sick or well, forfeited his pay for the period of absence. Where a clerk of the War Department, who had been absent without leave, produced, to account for his absence, a surgeon's certificate, *held* that such certificate did not *per se* operate to restore pay, but that it was in the discretion of the Secretary of War to accept or not such certificate and ratify the absence as authorized; that unless he should do so the pay would remain forfeited. 57, 231, *January, 1893*.

801. Under the act of March 3, 1893, a sick leave with pay can be granted to a clerk of a department on account of the illness of a member of his family, only when such member is "afflicted with a contagious disease and requires his care and attention." Where the disease is not in fact contagious, such leave can not legally be allowed. 62, 12, *October, 1893*.

802. Under the provision of the act of March 3, 1893, c. 2111, to the effect that "all employees provided for, by this paragraph, for the Record and Pension Bureau of the War Department, shall be exclusively engaged on the work of this office for the fiscal year eighteen hundred and ninety-four" *held* that a clerk of that office could not during such period legally be detailed for duty with the Civil Service Commission. 59, 9, *April, 1893*.

<sup>1</sup>There is no authority for the employment of a *vidua* clerk for a court martial, other than the "special" authorized by Sec. 1203, Rev. Sts., and referred to in pars. 958 and 959, A. R. (1062 and 1063 of 1901). An *enlisted man* may be detailed as such clerk under par. 958.

**803.** Sec. 7 of the act of March 15, 1898, provides that the head of any Department may grant thirty days' leave with pay in any one year to each clerk or employee, and also that, in exceptional and meritorious case, where a clerk or employee is personally ill, and where to limit the annual leave to thirty days would work peculiar hardship, the leave may be *extended* with pay not exceeding thirty days. In a later act (July 7, 1898) it was provided that nothing contained in the said section of the act of March 15th, shall be construed to prevent the head of the Department from granting thirty days annual leave with pay to a clerk or employee, notwithstanding the clerk or employee may have had not exceeding thirty days leave with pay on account of sickness. *Held* that construing these two acts together, they reestablish the old and simple law and custom of the Department to the effect that the Secretary of War may (through the heads of bureaus or personally) grant to each clerk and employee during each year thirty days leave with pay (called in the statutes "annual leave"), and in addition thereto, during the same period, a leave with pay not to exceed thirty days, if during such time the clerk or employee is compelled by personal illness to be absent.<sup>1</sup> Sixty days leave with pay is all that may be granted in any one year. Thus where a clerk has been absent sick thirty nine days and had drawn pay therefor, *held* that he could be allowed twenty one days leave with pay during the remainder of the year, but no more. Card 4694, *July, 1898*.

**804.** Where an application was made for the detail of a clerk on duty in the War Department, to instruct the battalion of cadets of the Washington High School six hours each week, without deduction of time or pay being made against him, *held* that the Secretary of War, in the absence of a statute authorizing such a detail, was without power to make it. 45, 495, *March, 1891*.

**805.** A clerk was discharged for cause from the Record and Pension Office. He subsequently asked to be permitted to resign as of the date the records showed he was discharged. *Held* that a discharge which has been carried into effect cannot be revoked, that to substitute a permission to resign for such executed discharge would be to substitute something that did not happen for what actually happened and therefore to make a false record. Card 3976, *March, 1898*.

**806.** *Held* that there was no authority of law for granting to a clerk in the Record and Pension Office an indefinite leave of absence without pay, to cover his absence as an officer of U. S. volunteers. Card 4129, *May, 1898*.

**807.** A clerk in the employ of the Government, who is also a notary public, is not precluded by reason of his employment as such clerk,

<sup>1</sup> See circulars, War Department, dated Dec. 2 and 3, 1898.

from receiving the statutory fees from parties who may secure his services as notary in the execution of contracts with the Government. Card 167, *August, 1894.*

#### CLERK—MISCELLANEOUS.

**808.** The appropriation act approved August 6, 1894 provides expressly that the clerks and messengers provided for by it "shall be employed and apportioned to the several headquarters and stations by the Secretary of War." *Held* that they are each to be employed by the Secretary of War at a particular specified salary and that department commanders have no power to discharge any of them or to increase or reduce their salaries. Card 380, *September, 1894.*

**809.** Clerks and messengers employed under the act of Congress approved August 6, 1894, when travelling under orders should be given the transportation, subsistence etc., authorized by the Army Regulations to be given civil employees when traveling under orders. Card 526, *October, 1894.*

**810.** Par. 1252, A. R., provides that "when the circumstances of their service make it necessary, civilians employed with the army may each be allowed one ration per day." *Held* that clerks at the headquarters of military departments while on duty with the army in the field, may if "the circumstances of their service make it necessary" be allowed a daily ration under this regulation. Cards 4190, 4385, *May and June, 1898.* (See A. R. 1378 of 1901.)

**811.** A clerk appointed under the act of Congress, approved August 6, 1894, is not eligible under existing law and regulations for appointment as a post non-commissioned staff officer. Card 2034, *February, 1896.*

**812.** There is no authority for paying the clerks of the Ordnance Department engaged outside of the War Department proper at arsenals away from Washington for time spent on either ordinary or sick leave of absence, the law allowing clerks leave of absence with pay not being applicable to them. Card 3793, *January, 1898.*

**813.** There is no precedent for allowing the traveling and other legitimate expenses of the personal clerk of an officer ordered before a court of inquiry. If he be a material witness he may of course be subpoenaed as such and be paid the legal witness fees. 57, 196, *January, 1893.*

**814.** Transportation requests were issued by the Quartermaster Department to five postal clerks, also requests for one double berth each in sleeping car, from Washington, D. C., to Tampa, Fla., on a verbal order from the Assistant Secretary of War, the nature of the

journey being "for duty with troops in the field." *Held* that the accounts could legally be paid from the appropriation for army transportation. Card 6927, *September, 1899.*

815. *Held* that the clerks in the Quartermaster Department who, in 1862, were employed as an armed force to protect public property at Washington and to assist in its defence, were not in the military service proper but remained civilians. The mere fact, therefore, that they served till their service was no longer required, did not, at the end of that time, place them in the *status* of being "honorably discharged" in the sense of the civil service rules regulating appointments to civil office. 35, 371, *October, 1889.*

## CLOTHING ALLOWANCE.

816. A sentence forfeiting "pay and allowances" for a certain period does not affect the right of the soldier to receive the necessary clothing during such period. It is supplied under A. R. 1294 (1193 of 1895; 1317 of 1901). XXIX, 591, *January, 1870*; 62, 244, *November, 1893.*

817. A soldier is not entitled to be credited in his clothing account with the value of clothing lost by fire or other casualty. This can be made good to him only through the reimbursement authorized by the act of March 3, 1885. 63, 278, *January, 1894.*

818. Pay and allowances are given to a soldier because he earns them or is, without fault on his part and by circumstances not within his control, prevented from doing so; and when pay is withheld from him for the reason that he (by his own fault) failed to earn it, his clothing allowance should be withheld for the same reason. Thus *held* that a soldier absent without leave by his own fault, or in the hands of the civil authorities serving sentence of a civil court, should not be allowed either pay or clothing allowance for the period of such unauthorized absence from duty. Card 2010, *February, 1896.*

819. A soldier was sentenced "to be confined at hard labor with forfeiture of all pay and allowances for six months" and while serving such sentence he drew clothing to the value of about thirty dollars which amount was charged against his clothing allowance accruing prior and subsequently to the period of confinement. *Held* that he forfeited his clothing allowance during the period of confinement under the terms of the sentence, and that it was proper to charge the same against him as stated. This is understood to accord with the practice in such cases. Card 1525, *July, 1895.*

820. Where a soldier was sentenced to dishonorable discharge "forfeiting all pay due or to become due," *held* that his right to clothing allowance, if there was any due him at date of discharge,



was wholly unaffected by the sentence; "allowances" being distinct from "pay." XLIX, 526, *December, 1885*.

821. The Army Appropriation Act for the year ending June 30, 1896, made the usual appropriation "for cloth, woolen material and for the manufacture of clothing for the army; for issue and sale at cost price according to the Army Regulations." Par. 1193, A. R. (1317 of 1901), prescribes that commanding officers may order necessary issues of clothing to military prisoners who have no clothing allowance from deserters or other damaged clothing or from clothing specially provided for the purpose. Damaged clothing and clothing specially provided would be unissued clothing purchased from the appropriation for clothing, camp and garrison equipage. This paragraph of the regulations (which is in effect a repetition of par. 1294, A. R., of 1889) should be accepted as an authoritative construction of that part of the appropriation act relating to clothing, etc., to the effect that the word "army", as used therein, includes general prisoners. *Held* therefore that the Secretary of War could legally authorize issues of overcoats, arctic overshoes, woolen mittens and flannel shirts to general prisoners,<sup>1</sup> as a charge against the appropriation for clothing of the army. Card 2057, *March, 1896*.

822. *Held* that the provision in an army appropriation act "for a suit of citizen's outer clothing \* \* \* to be issued upon release from confinement to each prisoner who has been confined under a court-martial sentence involving dishonorable discharge," did not apply where the sentence of the court adjudged dishonorable discharge without any term of confinement. Card 2925, *February, 1897*.

823. Circular 57, A. G. O., 1898, provides that "whenever articles of clothing of enlisted men have been destroyed to prevent contagion a gratuitous issue of such articles of clothing will be made to the enlisted men to whom such clothing belonged upon the certificate of the officer who has personal knowledge of the facts." *Held* that there was no provision for paying for the clothing destroyed, in lieu of the gratuitous issue authorized. Card 5588, *January, 1899*.

824. Clothing issued to a soldier and charged to his clothing account, becomes his personal property subject to its use in the military service and ceases to be an allowance subject to forfeiture. But such clothing found and turned in to the quartermaster after the soldier's desertion, should be considered as having been abandoned and become again the property of the United States. Card 3251, *June, 1897*.

825. A soldier discharged without honor does not by reason of such

<sup>1</sup> See Circular 5, A. G. O., 1896, authorizing such issues to be made under par. 1193, A. R. (1317 of 1901), when in the judgment of the department commander necessary to prevent suffering.



discharge forfeit his right to clothing already issued to him, and the same may properly be delivered to him if his clothing account is not overdrawn. Card 2107, *March, 1896*.

826. Where a soldier discharged without honor for fraudulent enlistment had overdrawn his clothing allowance to the amount of \$31.92, but left in the hands of the military authorities clothing of the value of \$31.46, *advised* that this clothing be turned over to the proper quartermaster, and that the money value be credited on the man's clothing account. Card 2113, *March, 1896*. The clothing in excess of the allowance for the time a soldier has served should be considered as government clothing advanced to him, and, on the rescinding of his contract for fraud in his enlistment, he should be required to return the same. Card 7782, *March, 1900*.

827. A soldier was tried for fraudulent enlistment and sentenced to be dishonorably discharged with forfeiture of all pay and allowances and confinement for six months. *Held* that clothing which had previously been issued to him could not legally be withheld from him unless he was to the extent of its value indebted to the United States on his clothing account. Card 3803, *January, 1898*.

828. Under Sec. 1302, Rev. Sts., "the money value of all clothing overdrawn by the soldier beyond his allowance shall be charged against him," and Sec. 1298 provides for gratuitous issues to replace clothing destroyed to prevent contagion, but there is no other statutory authority for gratuitous issues to enlisted men. Under Sec. 1296 the "President may prescribe the uniform of the army and quantity and kind of clothing which shall be issued annually to the troops of the United States;" and under this authority tables are issued showing the price of clothing, the allowance in kind to each soldier for each year of his enlistment, thus giving the money value of his clothing allowances, and these are changed from time to time in orders. Pars. 1189 and 1191, A. R. (1313 and 1315 of 1901), provide for gratuitous issues of certain articles to troops serving in extremely cold climates, such articles to be charged to the soldier only in case of loss or damage other than from fair wear and tear; and these regulations while purporting to provide for gratuitous issues may be treated as prescribing an increase of the allowance under the conditions named in the regulations. Where, therefore, the department commander directed a gratuitous issue of one suit of khaki uniform, one campaign hat, one pair of leggins and one pair of shoes to each enlisted man who was engaged in the campaign which ended with the attack upon and fall of Manila, P. I., on August 13, 1898, presumably to replace articles lost or damaged under the extraordinary conditions of the campaign, the issues to be made upon properly approved requisitions, &c., it was *held* that there was no legal objection to a

regulation providing for an increase in the clothing allowance to replace articles thereof which have been practically destroyed in carrying on a campaign under the conditions of the campaign in question, and that the regulation could be made retroactive to cover issues already made with respect to such conditions. Card 5802, *February, 1899*.

#### COLLEGE, ETC.<sup>1</sup>

**829.** Sec. 1225, Rev. Sts., provides for the detail of army officers at colleges, etc. The provision of this section that "the number of officers so detailed shall not exceed thirty at any time," means that only thirty officers in all active and retired shall be so detailed.<sup>2</sup> XXXVII, 201, *December, 1875*.

**830.** *Held*, that the term "established college or university within the United States," could properly and safely be construed as including only State universities or incorporated public institutions; that, in view especially of the fact that only thirty colleges, &c., could be provided with arms, military professors, &c., at one time, it could not be supposed that it was contemplated by Congress that the provisions of the statute should extend to private or unincorporated schools or academies. XLI, 496, *January, 1879*; XLII, 173, *February, 1879*.

**831.** The act of Sept. 26, 1888, c. 1037, in amending Sec. 1225, Rev. Sts., authorizes the detail of officers and issue of arms to "any established military institute, seminary or academy, college or university." *Held*, that the term "established," construed in connection with the terms of the previous legislation on this subject, was to be interpreted as including incorporated institutions or those established by law, such as State institutions, and that an unincorporated private school

<sup>1</sup> General Rules prescribed by the President, in accordance with the provisions of Sec. 1225, Rev. Sts., and relating to "Duties of Officers," "Organization and Discipline," "Course of Instruction," &c., together with the laws governing the subject, are published in G. O. 70, A. G. O., Dec. 11, 1897.

<sup>2</sup> The number has since been extended by the acts of Sept. 26, 1888 (25 Stats., 491), Jan. 13, 1891 (26 Stats., 716), and Nov. 3, 1893 (28 Stats., 7), and the detail of retired officers, without increased pay from the U. S., is authorized by Sec. 1260, R. S.; act of May 4, 1880 (21 Stats., 113); and act of February 26, 1901, amending Sec. 1225, Rev. Sts.

A retired officer detailed for service at a college under Sec. 1250, Rev. Sts., receives no additional compensation from the Government; if detailed under the act approved May 4, 1880, he may receive from the institution to which he may be detailed the difference between his retired and full pay but shall not receive from the United States any additional pay or allowance. Retired officers so detailed are in addition to the number of details authorized by Sec. 1225, as amended by act of Nov. 3, 1893.

Retired officers who, upon their own application are detailed to educational institutions in accordance with the provisions of the act of November 3, 1893, are included in the number of details authorized by that act—100 from the Army; and are entitled to the full pay of their rank (6 Comp. Dec. 124, Aug. 15, 1899), but not to commutation of quarters. 6 Comp. Dec. 506, Nov. 23, 1899. See provisions of the act of February 26, 1901, *supra*, in regard to the payment by the "schools" of commutation of quarters to retired officers detailed thereunder.

or other institution of learning was not to be regarded as "established" in the sense of this statute. Thus *held* that an unincorporated academy, owned and controlled by a partnership, was of the class of private institutions to which a detail of an officer as professor, or an issue of ordnance, could not legally be made. **64**, 442, *April*, 1894; **65**, 67, *May*, 1894.

**832.** *Held* that the High School of Bridgeport, Conn., which, as such, had no officer detailed for it as professor under Sec. 1225, Rev. Sts., but was allowed to avail itself of the occasional services of the officer of the army detailed as professor at Yale College, New Haven, was not entitled to an issue of arms under the statute. **41**, 308, *June*, 1890; Card 3271, *June*, 1897.

**833.** It is only colleges, &c., for which officers of the army have been detailed to act as professors, &c., under this section that the Secretary of War is authorized, by the same section, to supply with arms for the instruction of their students.<sup>1</sup> XXXVII, 201, *December*, 1875.

**834.** The Secretary of War is authorized to issue arms to any college, &c., where either an army or navy officer has been detailed under the provisions of Sec. 1225, Rev. Sts., as amended by the act of September 26, 1888.<sup>2</sup> **38**, 201, *January*, 1890.

**835.** The official of the college, &c., to whom the ordnance stores issued under this section are entrusted, may properly be required to render the returns indicated in Sec. 1167, Rev. Sts., which directs that all "officers, agents or persons," receiving or entrusted with ordnance stores or supplies, shall make certain regular returns of the same according to forms and rules prescribed by the Chief of Ordnance with the approval of the Secretary of War. XLII, 282, *May*, 1879.

**836.** It has been the general practice of the War Department under Sec. 1225, Rev. Sts., as amended by the act of September 26, 1888, to refuse applications for arms, etc., except when made by some "established military institute, seminary or academy, college or university," to which an army (or naval) officer had been regularly detailed; and this practice is believed to be in accordance with a fair and reasonable interpretation of the statute referred to.<sup>3</sup> Card 3271, *June*, 1897.

<sup>1</sup> By act of Sept. 26, 1888, amending Sec. 1225, R. S., and act of Aug. 6, 1894 (28 Stat., 1235), ordnance and ordnance stores may also be issued to institutions at which retired officers are detailed under the provisions of Sec. 1260, R. S., and act of May 4, 1880. 21 Stat., 113.

<sup>2</sup> The number of *any* officers detailed under existing law must not exceed *ten*. Act of November 3, 1893.

<sup>3</sup> In 1885 arms were issued to the Washington High School by the Secretary of War, but subsequently under date of November 25, 1890 the then Secretary held, upon an application from the same school for 100 caliber rifles, that there was no authority of law for the issue and declined to follow the precedent of 1885. At the same time he recommended Congressional action in the matter and Congress by joint resolution approved Feb. 5, 1891, authorized the issue.

837. Where it was found that arms issued by the Government to an institution were, through carelessness, damaged in a stated amount, *advised*, that, in default of payment, if it be desired to sue for the damages, the bond and sureties may be ignored, and suit brought directly against the owners of the institution (academy) alone, or suit may be brought on the bond; or if it be decided to demand, under the regulations of the War Department relating to the issue of arms to colleges, &c., the return of the arms, and the same were not returned in thirty days, the bond could be put in suit and the claim for damages included therewith. Card 2902, *February, 1897*.

#### COMMISSARY SERGEANT.

838. Sec. 1142, Rev. Sts., authorized the appointment of commissary sergeants from "sergeants of the line of the Army who shall have faithfully served therein five years, three years of which in the grade of non-commissioned officers." Where an applicant for appointment had served five years, about two and a half years of which as non-commissioned officer, and six months as commissioned officer of United States Volunteers, it was held, independently of the question whether the service in the volunteers could be counted in any event, that service as a commissioned officer could not be computed as service in the grade of non-commissioned officer expressly required by the statute. Card 6793, *August, 1899*.

#### COMPANY COMMANDER.

839. Extract from an endorsement of the Judge-Advocate General, in submitting to the Secretary of War a communication (concurrent in by the Judge-Advocate General) from Brig. Gen. E. O. C. Ord, commanding Dept. of Texas.

"Though I am aware of no law *in terms* prohibiting a company commander from delegating to a non-commissioned officer so important a part of his authority and duty as the entertaining in the first instance of the complaints and requests of the men of the company, I can but consider such a delegation to be at variance with the principle and system of our military organization. Further, such a practice, as it appears to me, must tend to render commissioned officers negligent and irresponsible, and non-commissioned officers arbitrary and overbearing. Indeed I can conceive of nothing that would sooner spoil a good sergeant than to place him in a position to determine at his discretion whether the complaints of his inferiors should be entertained



by his superior, and to color them at will when transmitted. Thus, though the practice may, in some instances, have been found convenient and innocuous, its effect in general must, I think, be prejudicial to the best interests of the service."<sup>1</sup> XLII, 273, *May, 1879*.

## COMPENSATION—FOR EXTRA SERVICES.

840. Upon an application by a clerk of a bureau of the War Department to be paid an amount in addition to his regular salary, as a compensation for services performed by him for a certain period as acting chief clerk, *held*, in view of the provisions of Secs. 1764 and 1765, Rev. Sts., that such additional compensation could not be allowed except by the authority of Congress.<sup>2</sup> XXXIX, 643, *August, 1878*.

841. *Held* that a soldier, who was employed in the capacity of an acting assistant surgeon for a certain period in time of war, could not legally be allowed, by the Secretary of War, for such service, any extra compensation (other than the extra pay provided for "constant labor" by Sec. 1287, Rev. Sts.) without a violation of Sec. 1765, Rev. Sts., but that Congress alone could authorize the same. XXX, 456, *June, 1879*. Similarly *held* that a soldier could not be allowed a compensation, additional to his regular pay, for special services claimed to have been rendered as a spy or scout during the civil war. XLI, 566, *April, 1880*.

842. *Held* that the existing law prohibiting the payment of extra compensation to salaried officers of the United States refers to payments from the Treasury of the United States, and did not affect the right of an officer of the army to receive from a State the salary of a State office exercised by him during the operation of the Reconstruction Laws (XXX, 159, *March, 1879*); or to receive the amount of a reward offered by the Governor of a State for the performance of certain public service. XXXIV, 388, *July, 1873*.

843. In construing statutes (Secs. 1763-1765, Rev. Sts.) restraining the Executive from giving dual or extra compensation, courts have aimed to carry out the legislative intent by giving them sufficient flexibility not to injure the public service and sufficient rigidity to prevent executive abuse.<sup>3</sup> These statutes can by no fair interpretation be held to embrace an employment which has no affinity, or connection, either in its character or by law or usage with the line of his official duty, or where the service to be performed is of a different character and

<sup>1</sup> Compare remarks of reviewing officer in G. C. M. O., 26, Dept. of the Columbia, 1879, do. 2, *id.*, 1880.

<sup>2</sup> Compare Hoyt v. United States, 10 Howard, 109, 141; United States v. Shoemaker, 7 Wallace, 338, 342; Stansbury v. United States, 8 Wallace, 321.

<sup>3</sup> Landrum v. U. S., 16 Ct. Cls., 74, 82.



for a different place and the amount of compensation is regulated by law.<sup>1</sup> Taking the sections all together, the purpose of the legislation was to prevent a person holding an office or appointment for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services, which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowance, or pay for other services which may be required of him either by act of Congress or by order of the head of his Department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may be held by one person at the same time. In the latter case he is, in the eye of the law, two officers or holds two places or appointments, the functions of which are separate and distinct, and according to all the decisions, he is in such case entitled to recover the two compensations. In the former case he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation.<sup>2</sup> Where therefore the disbursing clerk of the War Department (salary, \$2,000) performed certain clerical duties for the Gettysburg National Park commission, which were separate and distinct from his duties as such disbursing clerk, it was held that he could legally be paid for such extra services from the appropriation for the Gettysburg National Park. Card 3747, *December, 1897*.

#### COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE.

844. The Constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall actually be paid in advance of occupancy of land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed.<sup>3</sup> When there is no provision for compensation private property should not be taken against the consent of the owner for public use. Thus *held* that condemnation proceedings against land adjoining the Presidio of San Francisco, California, should not be instituted prior to an appropriation by Congress. Card 3231, *May, 1897*.

845. The fact that a person who has perfected an invention is an

<sup>1</sup> *Converse v. U. S.*, 21 Howard, 463, 470, 473; *U. S. v. Brindle*, 110 U. S., 688, 694; *U. S. v. Shoemaker*, 7 Wall., 338; *Meigs v. U. S.*, 19 Ct. Cl., 497; 15 Opins. At. Gen., 608.

<sup>2</sup> *U. S. v. Saunders*, 120 U. S., 126, 128, 130, 5 Comp. Dec., 9, 651, 693.

<sup>3</sup> *Cherokee Nation v. Kans. Ry. Co.*, 135 U. S., 641, 650.

officer or employee of the United States can affect in no manner either his right to procure a patent for said invention or to dispose of the same or of its use to the United States, or the authority of the proper department of the Government (if furnished with funds applicable to the purpose) to purchase such invention or its use, and pay a reasonable compensation or royalty for the same. So, if the Government, in the absence of any contract, takes and uses in the military or public service an invention which has been patented by an officer, soldier, or employee connected with the army, such officer, &c., has, under the provision of the Vth Amendment of the Constitution, the same right to a "just compensation" for such use that any civilian would have under the like circumstances.<sup>7</sup> If indeed, while performing his own proper duties, the officer, &c., in experimenting, framing models, &c., for his invention, has availed himself of the tools or materials of the government or other facilities afforded by a government workshop, &c., this fact is to be considered in connection with the question of the *quantum* of the compensation to be awarded him. XXI, 413, *May, 1866*.

## CONTRACT.

846. Sec. 3709, Rev. Sts., provides, generally, that "all purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services," shall be made by advertising for proposals "when the *public exigencies* do not require the immediate delivery of the articles or performance of the service." Exigencies growing out of a state of war, or hostilities with Indians, were probably mainly had in view, and it is exigencies of this class which have been considered in the adjudged cases in the Supreme Court and Court of Claims.<sup>8</sup> It is clear however that other exigencies may exist requiring that contracts or purchases be made at once or without the delay incident to advertising for proposals. Thus a loss of stores, structures, &c., on hand, caused by an *actus Dei* or *vis major*, as fire, storm, freshet, or a sudden riot or violent disorder; or a loss of supplies occasioned by the neglect of military subordinates in charge; or a failure of a contractor to fulfill a contract for supplies,

<sup>7</sup> See case of *Burns v. United States*, reported in 4 Ct. Cls. 113, and 12 Wallace, 24.

<sup>8</sup> See Report of Commission on Ordnance; Ex. Doc. 72, Senate, 37th Cong. 2d S. S., pp. 569-571, lease of Rodman cannon.

<sup>9</sup> See *United States v. Speed*, 8 Wallace, 83; *Reeside v. United States*, 2 Ct. Cls., . . . *Mowry v. United States*, *id.*, 68; *Stevens v. United States*, *id.*, 95; *Floyd v. United States*, *id.*, 429; *Crowell v. United States*, *id.*, 501; *Baker v. United States*, 3 *id.*, 343; *Henderson v. United States*, 4 *id.*, 75; *Child v. United States*, *id.*, 176; *Wentworth v. United States*, 5 *id.*, 302; *Wileox v. United States*, *id.*, 386; *Cobb v. United States*, 7 *id.*, 170, and 9 *id.*, 281; *Thompson v. United States*, *id.*, 187; *McKee v. United States*, 12 *id.*, 504.

transportation, or other service—might properly be regarded as constituting an "exigency" under the statute, if of such magnitude or injurious consequence to the army as to necessitate an immediate making good of the deficiency.<sup>1</sup> The general rule, however, of the statute in requiring a notice and invitation to the public as a preliminary to the awarding of a contract, is founded upon a sound and well-considered public policy, and exceptions thereto, especially in time of peace, should be recognized as admissible only where, if the rule were strictly complied with, the public interests would manifestly be most seriously prejudiced. XXXVII, 464, *April, 1876*; XXXIX, 527, *May, 1878*.

847. Thus, where a contractor failed in the performance of his contract, at a critical stage of an important and much-needed public work, and at a time of the year when, if the delay were incurred of advertising anew, there would be risked a loss of the appropriation; and a greatly increased charge to the United States, as well as serious embarrassment to the military service, would be involved—*held* that the situation might properly be viewed as an "exigency" justifying an immediate contract for the continuance of the work.<sup>2</sup> XLII, 339, *June, 1879*. But where, notwithstanding that Congress had failed to make appropriations for the fiscal year and no extra session had been convened for the purpose of having the omission supplied, there remained ample time for advertising for proposals for certain contracts for supplies before the supplies themselves would be needed, *held* that the circumstances did not justify a dispensing with the general rule prescribed by the statute, especially since, by the authority of Sec. 3732, Rev. Sts., contracts for these supplies could legally be made in the absence of an appropriation. XXXIX, 527, *May, 1878*.

848. The fact that a contractor for work can not complete his contract without losing money and desires to abandon it, does not constitute a "public exigency" in the sense of Sec. 3709, Rev. Sts.<sup>3</sup> L, 76, *February, 1880*.

849. Except in the case of an existing public exigency, a contract for supplies in the War Department or military branch of the service is to be preceded by an advertisement for proposals as directed in Sec. 3709, Rev. Sts. This advertisement is not a mere facility for the convenience of an executive department, which may be waived at discretion, but an essential proceeding prescribed by the statute as

<sup>1</sup> See G. O. 10 of 1879, §§22-25, pp 14-15; do 72, *et. al.*, p. 52; do 40 of 1880, p. 58; also McKee v. United States, 12 Ct. Cls., 504, 529-530.

<sup>2</sup> See 4 Comp. Dec., 175; 5 *et. al.*, 64.

<sup>3</sup> G. O. 10 of 1879, 2 Opins. At Gen., 257, 3 *id.*, 437; 10 *id.*, 28.

As to what shall constitute a public exigency, or authorize the procuring of supplies and the engaging of services without advertisement, see 566, A. R. (645 of 1901).

a condition to the exercise of the authority to enter into a contract for the United States. Thus enjoined, no omission or evasion of this prerequisite, however convenient such an omission or evasion may be, can legally be allowed.<sup>1</sup> So, *held* that it was no excuse for a non-compliance with the statute, by a quartermaster, that his contracts (made without advertisement) had been made with the most reliable parties and to the advantage of the United States. XXXIX, 84, *December, 1876*. And *held* that the requirement as to advertising for proposals must be complied with in contracting for a supply of articles purchased for *trial*, equally as if the contract were for the regular yearly supplies. XXXVII, 464, *April, 1876*.

850. The Army Appropriation Act of July 5, 1884, provides that, in purchasing supplies for the army under the Quartermaster and Commissary Departments, the award shall be made to the lowest responsible bidder.<sup>2</sup> When the award for furnishing such supplies was not made to the lowest bidder, though entirely responsible and competent, but a higher bidder was preferred, *held* that the contract was without binding force. 18, 265, *August, 1887*.

851. Where several bids are made in response to the advertisement, the Secretary of War may, for cause, refuse to authorize a contract with any of them. In accepting a bid he must be governed by a consideration for the public interests. If the lowest bidder, for example, is not furnished with the proper facilities to perform the proposed work—has not an available plant—he may be passed over for the next higher provided the latter be competent. 58, 26, *February, 1893*.

852. A contract for the printing for the headquarters of the military departments should be awarded to the lowest responsible bidder who

<sup>1</sup>See 6 Opins. At Gen., 406; 10 *id.*, 28, also opinion of the Solicitor General of March 20, 1876 (15 Opins. At Gen., 538), wherein, in holding contracts made without advertising to be not binding on the United States, he dissents from the opinion of Atty. Gen. Bates, in 10 Opins., 416, to the effect that while an absence of the prescribed advertisement will render illegal and inoperative an unexecuted contract, the Government cannot, on account of such omission, rescind, to the damage of a contractor, a contract entered into by him in good faith and partly performed. In a later opinion of April 27, 1877 (15 Opins., 235), the Attorney General refers to the question, whether the provision of Sec. 3759, Rev. Stat., requiring that contracts in general shall be preceded by advertisement, is mandatory or only directory, as one which has been much discussed (*see*, for example, the reference to this question in *Fowler v. United States*, 3 Ct. Cls., 47), but is not required to be decided in that opinion. In *Schneider v. U.S.*, 19 Ct. Cls., 547, 551, it is held that in the absence of any exigency in fact or one determined to exist this provision is mandatory, and a contract made in violation of it is void. Whatever may be the true construction of this Section, it is clear that no officer of the army, in the absence of express authority to do so from the Secretary of War, can be justified in omitting to comply with the provision in regard to advertising.

As to the manner of advertising in certain cases, see 1 Comp. Dec., 363; 2 *id.*, 632, 3 *id.*, 175; 5 *id.*, 4, 66.

<sup>2</sup>See Army Appropriation Act of March 2, 1901, for the most recent legislation on this subject.



is also a practical printer and in a position to perform the work unaided by the Government. 61, 335, *September, 1893*.

853. The discretion of determining when a "public exigency" within the meaning of Sec. 3709, Rev. Sts. and par. 566, A. R. (645 of 1901), exists, is vested in the highest authority whenever the circumstances of the case admit of it.<sup>1</sup> Where, however, the Secretary of War should have authorized an exigency purchase before it was made, he may, if in his judgment the public exigency existed, approve the expenditure after it has been made. Card 3481, *September, 1897*.

854. Under date of March 21, 1898, a contract was made, *inter alia*, for certain repairs to a barrack building at Fort Monroe, Va., the work to commence on or before March 30, 1898. By reason of the war with Spain, the contractors were not permitted to begin the repairs until June 29th following. They were also required by the officer in charge of the work to do certain extra work. *Held*, that the circumstances of the case created an emergency calling for the additional work, or at any rate, rendered the work such that only these contractors could properly perform it, and that therefore no advertisement was necessary. And further *held* that while the amount of compensation for the additional work was not agreed upon in advance, the contractors were entitled to what the materials and service were reasonably worth.<sup>2</sup> Card 5901, *March, 1899*.

<sup>1</sup> As to the authority who is to decide whether there exists such an exigency as is contemplated by the statute, the Supreme Court, in *United States v. Speed*, 8 Wallace, 83, has held that it is "the officer charged with the duty of procuring supplies or services who is invested with this discretion." This description is rather general, nor is the term "the purchasing officer," by which the Court of Claims explains it, in *Thompson v. United States*, 9 Ct. Cls., 196, a much more precise definition. It is clear, however, that a subordinate officer charged with the duty of being the immediate representative of the United States in a contract or purchase should not, in general, venture to dispense with advertising, on the theory of the existence of a public exigency, in the absence of instructions or orders from a proper superior. Nor, on the other hand, will a superior officer, in entering into a contract for his command or branch of the service, properly assume that an "exigency" exists authorizing him to dispense with the statutory forms, when the period is time of peace and no imperative necessity exists for the immediate delivery of the supplies or performance of the service proposed to be contracted for. It is to be noted that the cases both of *Speed* and *Thompson* related to contracts entered into during the civil war. In the instructive opinions of the Attorney General on the "Fifteen per cent. Contracts" of April 27 and May 3, 1877 (15 Opins., 253, 254), it is held that the "exigency" contemplated by the statute can be one of *time* only, and that it can be regarded as existing only where an *immediate* delivery or performance is required by a public necessity.

See, however, 3 Comp. Dec., 470; 5 *id.*, 84.

<sup>2</sup> In a decision dated Jan. 30, 1898 (2 Comp. Dec., 374), Comptroller Bowler said: It is established that where in good faith work has been done under an informal contract compensation therefor upon the basis of a *quantum meruit* may be recovered from the United States (*Clark v. U. S.*, 35 U. S., 539; and it was therein held that in the absence of other evidence, the contract price might be considered sufficient evidence of the value of the services rendered, and substantially to the same effect in *Solomon v. U. S.* (19 Wall. 17)). It has furthermore been held that where recovery may be had upon a *quantum meruit* for the work and labor done under an implied or informal contract, the accounting officers of the Treasury have jurisdiction to settle the claim. *Dennis v. U. S.*, 20 Ct. Cls., 119; See also, 5 Comp. Dec., 588; 6 *id.*, 951.



855. The main object of the advertisement is to induce a free and open competition for the contracts of the government and thus to protect the United States from fraudulent combinations and collusive preferences in its business transactions.<sup>1</sup> At the same time the advertisement, in inviting proposals from the public, is properly to be viewed as a *pledge* on the part of the United States that the contract will, as a general rule, be awarded to the lowest bidder, provided he is a responsible person and his bid is a reasonable one, and provided, of course, he complies with the existing regulations—as to bond, &c.<sup>2</sup> XXXIX, 426, and XLI, 113, *February, 1878*. The reservation not unfrequently added in the advertisement, that “the United States reserves the right to reject any or all proposals,” is simply precautionary, and should not be, and is not, in general taken advantage of except where the lowest bidder fails to meet the legal and proper conditions.<sup>3</sup> A further instance in which the United States may properly reject a bid or bids is in a case of *fraud*—as where the lowest bidder has colluded with other bidders or with the representative of the United States to impose a high price upon the government. In such a case the bids of all bidders concerned in the fraud may properly be rejected. XXXVII, 564, *May, 1876*.

856. An executive officer, in awarding and entering into a contract after advertisement, is not authorized to require from the contractor a stipulation at variance with the conditions stated in the advertisement, or to assent to such a stipulation if proposed by him;—for example a stipulation for the furnishing of a quantity of supplies greater than that called for in the advertisement.<sup>4</sup> XXXIX, 425, *February, 1878*.

<sup>1</sup> See *Harvey v. United States*, 8 Ct. Cls., 506. In regard to a statute similar to Sec. 1709 governing the Post Office Department, the Supreme Court, in *Garbelle v. United States*, 3 Otto, 246, say: “The object of the statute was to secure notice, \* \* \* that bidders might compete, that favoritism should be prevented, that efficiency and economy in the service should be obtained.”

<sup>2</sup> See regulations in regard to contracts, published in G. O. 10, Hdqrs. of Army of 1879, repeated and amended in G. O. 72 of same year and G. O. 40 of 1880, now incorporated in Articles LV and LVI, Army Regulations of 1895.

<sup>3</sup> See par. 543, Army Regulations of 1895, as follows: “Except in rare cases when the United States may elect to exercise its right to reject proposals, contracts will be awarded to the lowest responsible *bona fide* bidder, for furnishing a proper article, whose proposal is not unreasonable.”

<sup>4</sup> In an opinion under an act of 1843 similar to the existing law, requiring the letting of contracts in the navy upon advertisements for proposals, it was held by Atty. Gen. Nelson, 4 Opinions, 334, that the Navy Department was not authorized, “in awarding the contract to the lowest bidder, to modify its terms, as proposed for, in regard to the *time of delivery*, or any other of its material elements. The obvious purpose,” he adds, “of the act in question was to invite competition in the proposals, and it therefore requires that the advertisement emanating from the department shall particularize every thing that may essentially affect the contract. That the time of delivery may be, in a contract of this description, a material element, the circumstances connected with this case clearly evince. *Nos constat*, if the time had been extended, as now proposed, on the face of the advertisement, that other and

857. Where the advertisement calls for proposals for supplies to be delivered at a particular *place* specified, the place of delivery is a material condition of the contract invited to be bid for, and the same should therefore be awarded to the lowest bidder engaging to make delivery at the place designated. To prefer to such bidder another whose bid is lower, but whose offer is to make delivery at a different place, would be unauthorized and illegal, however convenient the place named by him might in fact be to the military authorities.<sup>1</sup> XXXIX, 425, and XLI, 113, *February, 1878*.

858. Where, by an express stipulation in a contract for quartermaster stores, made in accordance with a specific advertisement, the time within which the same were to be furnished to and received by the United States, was limited to a stated period, *held* that the Secretary of War would not be authorized to extend the operation of the contract beyond that period, so as to admit the delivery of additional stores under the same, but that, for such additional quantity, it would be necessary to contract *de novo* in the regular legal mode, upon new advertisement, proposals, and award. XXXVI, 463, *May, 1875*. And *held* that the fact that the contract contained a stipulation to the effect that the same might upon mutual agreement be abrogated, modified, or extended, did not add to the authority of the Secretary in such a case; such a stipulation being in derogation of law.<sup>2</sup> XXXVII, 478, *April, 1876*; XXXIX, 654, *September, 1878*; XLI, 182, *April, 1878*.

859. The Army Appropriation Act for the year ending June 30, 1895, provided that open market purchases could be made when the aggregate amount required did not exceed two hundred dollars, but

lower offers than were received might not have been made. It may well be that a manufacturer may not be in a condition to deliver at one time, and yet be fully capable of doing so at another, and that, whilst he would be restrained by this inability from competing for a contract within the time limited by the proposals, he might have successfully done so had the extended time been advertised."

<sup>1</sup> See, also, 7 Comp. Dec., 92, 95.

<sup>2</sup> See note to § 850, *ante*.

<sup>3</sup> In a case of a contract in the Post Office Department, containing a stipulation for extension, &c., by the authority of which the operation of the contract had been extended beyond the period expressly limited therein, although by a statute governing the case it was required that all such contracts should be made upon advertisement, proposals, &c., it was held by Attorney General Hoar (13 Opins., 174) as follows:—"I am of the opinion that the provisions of that statute apply to the contract in question, and that, although the contract contained a provision for its extension and modification at the pleasure of the contracting parties, such a provision was not authorized by law. If a contract, which the law only allows to be made in pursuance of an advertisement, could afterward be renewed and extended at the pleasure of the Postmaster General without any advertisement, it would be in the power of that officer and his successors in office, unless restrained by some subsequent act of the legislature, to make for all future time such contracts as he might think expedient, without reference to the conditions contained in the original advertisement for proposals, or to the terms upon which the contract was offered to public competition."

that every such purchase should be immediately reported to the Secretary of War.<sup>1</sup> On the question as to the powers and duties of the Secretary of War in reference to the class of purchases referred to, *held* that this legislation considered in connection with Sections 216 and 1164, Rev. Sts., and the fact that the Secretary of War is the representative of the President, vests in the Secretary the power and the duty to make necessary regulations to carry into effect the legislation in question and in doing so he may legally require proposed open market purchases to be submitted for his approval. Card 1112, *March, 1895*.

860. Contracts "for personal services," specially excepted by the statute Sec. 3709, Rev. Sts. from the application of the provision as to advertising for proposals, are contracts for services to be rendered in person by the party or parties who contract to furnish them whether the character of the services are skilled or not.<sup>2</sup> So *held* that services of physician, services of washerwomen, services in repairing mattresses, bedsteads, clocks, chairs, etc., and in hauling rubbish, etc., if to be rendered in person by those who contract to perform them are "personal services" within the meaning of this section. Card 653, *November, 1894*.

861. Sec. 3709, Rev. Sts., requires that when contracts are made for supplies or services, they shall be made in a certain form, but it does not necessarily preclude having public work performed by hired laborers where it is not deemed desirable to enter into a formal agreement with a contractor for the purpose. So *held* that the Secretary of War, under whose direction the appropriations for the construction of the new State War and Navy Building were required by statute to be expended, was empowered to cause the plastering, or other particular work therein capable of being properly done by hired day labor, to be so done,

<sup>1</sup> This provision was repeated in the Army Appropriation Act, approved Mar. 15, 1898 (30 Stat. , 322), but see the later legislation in the corresponding act, approved March 2, 1901.

<sup>2</sup> In an opinion of Attorney General Bates, dated May 23, 1862 (10 Opins. , 261), it was held that a contract for surveying reservation lands under a treaty with the Indians was "personal services" within the meaning of Section 10 of the act of March 2, 1861 (12 Stat. , 220), now embodied in Sec. 3709, R. S. — the reason assigned being that the services required not only fidelity and integrity but a certain kind of skill and knowledge, and that the contracting officer should have discretion in selecting those who possess the required qualifications. In later opinions, however, "personal services," as used in Sec. 3709, R. S., are held to include services to be rendered in person by the party contracted with, who thus becomes a servant of the Government. (15 Opins. At. Gen. , 235, 253, 19 *id.* , 496.) In 6 Comp. Decs. , 314, the term "personal services," as used in this section, is defined as services to be "performed by a single person, or by firms, for the Government, under a contract made with the Government to render for it, his, or their individual services, of either skilled or unskilled labor, under the direction of the Government, thereby becoming the servant of the Government in the performance of such labor." See, also, Par. 518, A. R. of 1895—596 of 1901.

instead of under contract made upon advertisement and proposals, provided he deemed it to be for the public interest to prefer the former mode. XII, 121, *February, 1878*.

862. *Held* that the purchase of the gray cloth used for the uniforms of the cadets of the Military Academy was not a "purchase of supplies in the War Department," in the sense of Sec. 3709, Rev. Sts., and was therefore not required to be made by advertising. This Section has apparently in view purchases of supplies for the uses and purposes of the United States, under appropriations made specifically for such supplies or clearly applicable to them and expended as public funds under the control and direction of the head of the War Department. The cadet clothing is purchased not as "supplies" for the army in general but for the special use of a particular class of persons, and is paid for, not out of an appropriation for the military establishment, but out of their monthly pay. The continued usage of a department in regard to any transaction is an important factor in the construction of the law relating thereto,<sup>1</sup> and for upwards of fifty years the clothing in question has been purchased in open market, from a particular mills company. *Advised* that such usage might be continued without contravention of existing law. 48, 198, *July, 1891*.

863. Sec. 3 of the act of Aug. 11, 1888, in providing that when river and harbor works are done by contract, the contract shall be made after sufficient advertisement, &c., does not, like Sec. 3709, R. S., except cases of emergency, but it may be and is in practice construed to permit such contracts to be made without advertising in cases of emergency. Card 5279, *November, 1898*.

864. The act of March 15, 1898 (30 Stats., 322), which authorizes "open market" purchases not exceeding \$200, relates to supplies for the army and does not apply to purchases for carrying on works of river and harbor improvement; but by sec. 3, of the act of Aug. 11, 1888 (25 Stat., 423), it is made the duty of the Secretary of War to apply the money appropriated for such improvement "in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government." This provision might be construed as leaving the purchases of supplies and the engagement of services necessary in carrying on the works, otherwise than by contract, to be controlled by Sec. 3709, Rev. Sts., the general law on the subject, and under such construction the purchase of supplies for these works, whether under \$200 or not, and engagement of services not personal, could only be made without advertisement in cases of emergency. In practice however it has been construed as dispensing with

<sup>1</sup> 2 Opans. At. Gen., 558; 4 *id.*, 467, 470, 10 *id.*, 52.



advertisement where it would be most economical and advantageous to the Government to do so. Card 7315, *November 18, 1899*.

865. Where, pursuant to Sec. 3709, Rev. Sts., advertisement has been once duly made, the law has been complied with. If this advertisement is without result, it is not necessary (though it is permissible) to advertise again, or to go on advertising till an acceptable proposal be received, but open market purchase may be resorted to. 62, 494, *December, 1893*. Card 8036, *September, 1900*. In the latter case however, the purchase must be limited to the article or articles previously advertised for. Card 313, *October, 1894*. See Card 8198, *May, 1900*.

866. Proposals were invited for construction of six locks and dams on the Monongahela River and the specifications provided as follows: "Bids will be received for the lock and dam complete at any one site, or at two or more sites, or at all six sites, and if accepted contracts will be awarded for each site separately or for two or more sites, or a single contract will be awarded for the whole improvement at the six sites as may appear most economical and advantageous to the United States." One of the bidders in a letter attached to his proposal offered, if awarded contracts for three of the locks and dams, to accept at a reduction of 3 per cent on the amount proposed for them separately; if awarded four locks and dams, the reduction should be 4 per cent, and if awarded contracts for the six locks and dams a reduction of 5 per cent could be made. *Held* that the offer made in this letter was responsive to the specifications calling for proposals and should be treated as a part of the proposal. Card 3488, *September, 1897*.

867. Where an advertisement inviting proposals for furnishing law books to the War Department specified that the proposals would be received at a certain office of the department until 12 o'clock noon on a particular day, and two bids were duly received by the time named, *held* that a third bid received at one o'clock p. m. should not be considered. 47, 403, *June, 1891*.

868. Where a bidder proposed to complete the advertised work at a time different by five months from that set forth in the advertisement, *held* that the variance was material and that the bid could not legally be entertained. To let the contract on such a bid would be in effect to make a contract without advertising, and such a contract would not be binding.<sup>1</sup> 56, 356, *November, 1892*.

869. Sec. 3709, Rev. Sts., does not require that a contract shall be awarded to the lowest bidder, and it is usual for the United States, in advertisements for proposals, to reserve the right to reject any and all bids. *Held*, in a case where this reservation had been made, that

<sup>1</sup> *Schneider v. U. S.*, 19 Ct. Cls., 547, 551; 15 Opins. At. Gen., 538.



the Secretary of War was legally authorized to permit a bidder (before the awarding of the contract) to withdraw, or have rejected, a bid in which a clerical error, to his detriment, had been made in the amount bid for certain work. XLV, 19, *September, 1881*; 65, 7, *May, 1894*.

870. A bidder may withdraw his bid at any time before receipt of notice of acceptance without rendering himself or his guarantors liable to suit on the guaranty which may have accompanied his proposal.<sup>1</sup> 65, 378, *July, 1894*. So, *held*, where an officer of the Quartermaster's Department advertised for proposals for the construction of a bridge, and having received several, opened and forwarded them to the Quartermaster General, and the lowest bidder (a bridge company), before any bid was accepted or award of contract was made, gave notice to the officer who had invited the proposals and to the Quartermaster General that it withdrew its bid. Card 419, *October, 1894*. Where the notice to bidders announced that no award or acceptance of bid "under this advertisement" would be made until Congress should appropriate funds for the purchase of the supplies to be contracted for, *held* that a bidder was entitled to withdraw his bid at any time before the event and action indicated. 65, 378, *supra*.

871. A contract for mosquito bars was regularly awarded to a party upon a proposal submitted by him. Subsequently he asked that the award be cancelled on the ground of mistake in calculation on fabric for the bars, stating that an employee to whom the matter of calculation was intrusted based the same on a fabric, valued roughly at 30 cents per piece of eight yards; that too late to correct it he discovered that the extra heavy fabric in the department standard sample would cost at least 75 cents per piece; and that in furnishing the bars called for with a possible increase of 10% he would lose from 4500 to 9000 dollars. *Held* that the mistake was due to the carelessness of the bid-

<sup>1</sup> 9 Opins. At. Gen., 174; 15 *id.*, 648, 651.

In the latter opinion the Attorney-General held that as the guaranty accompanying the bid was for the acts of the bidder "after being notified of the acceptance of said bid," and the withdrawal of the bid having taken place prior to its acceptance, neither the bidder nor his sureties were liable upon the guaranty. He intimated, however, that a recurrence of the difficulty might be avoided by a properly worded statute or guaranty. In a later opinion, dated August 31, 1894 (21 Opins., 56), he cited these opinions as the rulings of the Department of Justice "in the absence of any special statutory provision;" but referring to Section 4719, Revised Statutes, relating to bids in the Navy Department, as requiring each proposal to be accompanied "by a written guaranty \* \* \* that the bidder if his bid is accepted, will \* \* \* give bond with good and sufficient sureties to furnish the supplies proposed," said: "Strictly construed, this does not prevent a withdrawal before acceptance. Liberally construed, in conformity with the manifest intent of the provision, I think it may fairly be held that it binds the bidder to stand by his bid, at least after the hour of opening. The case being doubtful, I am inclined to given liberal construction to the statute, since in this way only can its authoritative construction be obtained from the courts. I would therefore advise that Mr. Neville be held to his proposal, and that no right of withdrawal on his part be recognized, but that he and his guarantors be held responsible." See, also, par. 538, A. R. of 1895 (616 of 1901).

der or his agent, and that the United States was in no way responsible for it; that it was not a mutual error or one which entered into the terms of the contract so as to prevent the agreement on the same thing; and that under the circumstances stated the bidder was not legally entitled to relief.<sup>1</sup> Card 5462, *December, 1898*.

872. Proposals for supplying the Government 25000 mosquito bars were opened on June 20, 1899. The lowest and next lowest bids (from the same place of business) were respectively 45½ and 46½ cents per bar. On the day following the opening these bidders claimed that errors were made in copying their bids into the blank proposals, referring to their original memoranda to show that the price intended in one was 75½ cents, and in the other 76½ cents, and asked to have the corrections made. To grant the request would make another party the lowest bidder at 67½ cents per bar. *Held* that if the errors occurred as claimed the mistakes were such as to exclude consent to the same thing, so that on acceptance of the bid there would be no true contract—one party intending one thing, and the other party another thing; that therefore the proposals containing the erroneous prices should not be treated as binding upon the parties making them.<sup>2</sup> Card 6802, *July, 1899*. Similarly *held* where a company submitted a proposal, *inter alia*, for furnishing 48 hand cuffs the price for the lot being \$17.90, but before the award was made had stated that they had intended to bid \$179, and that the error was a clerical one, it further appearing that the next lowest bid was \$150. Card 5958, *March, 1899*.

873. Par. 645, A. R. (533 of 1895; 611 of 1901), does not absolutely require guaranties in all cases, but when they are required and it is announced that no proposal will be considered unless accompanied by a guaranty, to accept a bid unaccompanied by a guaranty, while not

<sup>1</sup> If one party only acts under a mistake, and the other is in no degree responsible for it, the contract is ordinarily valid, the former being estopped to set up the mistake as against the latter. Bishop on Contracts, § 701.

In an opinion dated June 1, 1895 (21 Opins., 186), Attorney General Olney held that after a bid had been accepted, "the bidders have no right to withdraw their proposal merely because of a mistake on their part which was not mutual and which was due to their negligence," the mistake being two errors in calculation, making a difference of \$6000 in the result.

<sup>2</sup> In Pollock on Contracts, under the head of "mistake as excluding true consent", it is stated that—"It may happen that each party meant something, it may be a perfectly understood and definite thing, but not the same thing which the other meant. Thus their minds never met, as is not uncommonly said, and the forms they have gone through are inoperative," and that in this "class of cases either one party or both may be in error, however that which prevents any contract from being formed is not the existence of error but the want of true consent." Ward's Pollock on Contracts, 1885, pp. 411, 412.

Under date of Jan. 14, 1891, Attorney General Miller (20 Opins., 1) held where an advertisement was made for proposals for installing an electric light plant, and one of the bids was \$4350, and the bidder asked to withdraw the bid, claiming that it had been made erroneously instead of \$9350, the real bid, "that if the fact be that the bid was made under a mistake of fact, it is no bid at all, and ought not to be considered, that if accepted it would not be binding on" the bidder.

affecting the validity of such acceptance, would not be acting in good faith. Card 261, *September, 1894*.

874. In March, 1894, proposals were invited for four contemplated river improvements. The lowest bid for one of the works was accepted and contract entered into, but no action on the proposals for the other three was taken at that time. Subsequently, after the expiration of the period named in the guaranties which accompanied the proposals, the acceptance of the lowest bids in two of the cases was recommended by the Chief of Engineers. *Remarkd* that there was no legal objection to such acceptance provided the bidders to whom it was proposed to award the contracts were willing to enter into the same; their consent being necessary as their guaranties were no longer operative. Card 371, *September, 1894*.

875. Where, at the end of the ten days specified in his guaranty, the accepted bidder had failed to enter into the contract, *held* that the liability of the guarantors had attached, and that, the public interests not being prejudiced, the contract might legally be entered into with one of the guarantors, as an open market transaction in which he takes the risk on his own account at the rate proposed in the bid. 32, 158, *May, 1889*.

876. The Secretary of War is without power to release a guarantor from the obligations he has assumed in a guaranty accompanying a proposal. The only duty of the Secretary respecting such guaranty is to turn it over to the proper officers of the government for enforcement, in case the contractor makes default. Cards 3489, *September, 1897*; 5462, *December, 1898*.

877. Par. 533 A. R. (611 of 1901), requiring guaranties to accompany proposals in the cases named therein, is a regulation prescribed pursuant to and in aid of a statute, the act of Congress, approved April 10, 1878, as amended by the act, approved March 3, 1883. Such a regulation is as binding upon the authority that made it as upon others.<sup>1</sup> So where a guaranty was required to accompany the proposal, and none was furnished, *held* that the omission was not an irregularity which could be waived by the Secretary of War. Card 2860, *January, 1897*. But while the entering into a contract under such circumstances would be a violation of the regulation, the contract itself would nevertheless be valid, the regulation being viewed as directory only. Cards 6285, *April, 1899*; 7613, *January, 1900*; 7956, *April, 1900*.

878. A lowest bidder failed to furnish a guaranty, one for five hundred dollars being specifically required in the instructions to bidders, but submitted his certified check, adding to his proposal and signing

<sup>1</sup>U. S. v. Barrows, et al., 1 Abbott, 351 (No. 14,529, Federal Cases.)

the following statement: "In lieu of above we submit certified check to the amount of guaranty." The instructions specified the terms to be embodied in the guaranty and the certified check was submitted in lieu of such guaranty. It could therefore be applied to secure the United States under the conditions specified and should be treated as a substantial compliance with the provisions of A. R. 533. Card 7613, January, 1900.

**879.** Sec. 3744, Rev. Sts., prescribes that "It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof." Were it not for the provisions of this section the acceptance of a bid would, under the general law of contracts, bind the United States. But this section has been construed by the Supreme Court as being in the nature of a statute of frauds and mandatory in its requirements, and therefore making it essential that a contract, to be legal and obligatory, shall be in writing and signed by the parties.<sup>1</sup> The mere proposal of a bidder, accepted on the part of the Government, does not therefore operate as a contract but is simply a proceeding preliminary to contract; nor does such an acceptance bind the United States to enter into a contract. **58**, 87, 355, *October and November, 1892*; **60**, 315, *July, 1893*; **64**, 370, *April, 1894*; **65**, 378, *July, 1894*.

**880.** Par. 549, A. R. (627 of 1901), provides three methods of purchasing supplies, etc., to wit: 1. "By contract 'reduced to writing and signed

<sup>1</sup>Clark v. U. S., 35 U. S., 539; *Salomon v. U. S.*, 19 Wall., 17; *South Boston Iron Company v. U. S.*, 16 U. S., 37, 42; 18 Court Claims, 165; *Lindsley's case*, 4 *id.*, 359; *Jones' case*, 11 *id.*, 733; *Steele v. U. S.*, 19 *id.*, 181; *International Contracting Company v. Lamont*, 2 Appeal Cases, D. C., 532; 3 Comp. Dec. 368; 4 *id.*, 680; 5 *id.*, 246, 588, 826; 6 *id.*, 880.

But where a contract not made as required by the statute has been wholly or partially executed, the party performing will be entitled to the fair value of the property or services furnished as upon an implied or quasi contract for a *quantum meruit*. *Clark v. U. S.*, *supra*; 4 Comp. Dec., 680; 5 *id.*, 588, 826; 6 *id.*, 553. In the absence of other evidence, the amount agreed upon will be assumed to be the fair value of the property or services. 4 Comp. Dec., 680; 6 *id.*, 553, 951.

In the case of the *South Boston Iron Company*, *supra*, the company had offered by letter to the Secretary of the Navy to construct certain boilers and the offer had been accepted by letter, but the acceptance had subsequently been withdrawn. The Supreme Court held that the letters did not constitute a contract under the provisions of Sec. 3744, Rev. Sts., the court remarking that they were nothing more than preliminary memoranda made by the parties in preparing a contract for execution in the form required by law.

In the case of the *International Contracting Company v. Lamont*, *supra*, the company was the lowest bidder for certain work, its proposal was approved and recommended for acceptance by the local engineer officer, was approved and authorized to be accepted by the Chief of Engineers, and the company was so notified. But the Secretary of War declined to approve the bid and ordered its rejection. The court held that in view of the requirements of Sec. 3744, Rev. Sts., no contract had been entered into.



by the contracting parties with their names at the end thereof;" 2, "by written proposal and written acceptance;" and 3, "by oral agreement." This paragraph further provides that "when delivery or performance does not immediately follow an award or bargain, the first method will be used," *i. e.*, "by contract reduced to writing," etc.; and that "when delivery or performance immediately follows an award or bargain, the second method may be resorted to." The first method constitutes a contract under Sec. 3744, R. S., but the second (proposal and acceptance) does not.<sup>1</sup> The regulation permits the second method to be used when the material is to be delivered at the time the bargain is made, because in that case it is not necessary to bind any one, but requires the first method to be used in cases where the delivery is to be made in the future, because in these cases it is necessary to bind the parties, and this cannot be done except by "contract reduced to writing," etc. Card 5275, *November, 1898*. Thus where proposals for fresh meat for one year for the use of government employes had been invited and received, it was *held* that under this statute and A. R., 549, *supra*, based thereon, to accept the lowest bid as an informal agreement would not be binding on the parties; the case being one where the agreement should be "reduced to writing and signed by the contracting parties with their names at the end thereof." Card 2074, *February and March, 1896*.

881. Owing to the fact that an improper plane had been taken for several years as the average flood tide in the matter of measuring the depth to be maintained at the South Pass, La., by the James B. Eades estate, certain moneys to which the estate was lawfully entitled had been withheld from it. The executors of the estate, while claiming the right to be paid all amounts so withheld, proposed to waive their right to all that accrued prior to Jan. 1, 1895, if the Secretary of War would authorize payment of the amounts withheld since that date. The Secretary of War accepted the proposal. *Held*, that the letters of the executors proposing the compromise and expressing satisfaction with the Secretary of War's acceptance did not constitute a sufficient waiver of all claims against the United States for the years prior to Jan. 1, 1895. The letters and indorsements relating to the waiver constitute under Sec. 3744, Rev. Sts., only preliminary negotiations. To legally bind both parties to the agreement reached, it should be reduced to writing and signed as required by that statute. Card 2116, *March, 1896*.

882. Where a lease was made for one year with a provision for renewal from year to year for several years, at the option of the United

<sup>1</sup>See note to § 879, *ante*, also, 1 Comp. Dec., 264.



States, it was *held* that in view of Sec. 3744, Rev. Sts., as construed by the U. S. Supreme Court, written notice of the renewal with an indorsement thereon of acceptance by the lessor would not be a binding contract; but *advised* that a brief contract referring to the original lease in a way to identify it and providing for the renewal for the succeeding fiscal year, and signed by the proper officer on behalf of the United States and the lessor with their names at the end thereof, would comply with the requirements of the statute. Such a contract could be made at the beginning of each fiscal year during the term named in the original lease. Card 7214, *October, 1899.*

**883.** A party orally offered on the 30th of May, 1898, to deliver at St. Louis, Mo., to the quartermaster there, 700 draft mules within ten days after receipt of an order to deliver them; the mules to be in proper condition and subject to inspection. On the 2d of June following, the quartermaster gave an order for the full number. No written contract had been entered into by the parties, and neither party had contemplated entering into one. Four days after making the order for the delivery and before any mules had been delivered, the quartermaster by direction of the quartermaster general cancelled the order. *Held* that as there was no written contract, the Government was not legally liable for its failure to take the mules. Card 5102, *October, 1898.*

**884.** In April, 1898, when extraordinary efforts were being made to mine a harbor for defence against possible attack, the local engineer officer ordered from an electric company by letter a large quantity of leaded cable which the company promised by letter to furnish and deliver at the place needed. No formal written contract was made. The cable had not arrived at the time it was needed and the officer thereupon purchased the amount he required from other parties. Subsequently the cable first ordered arrived, but too late to be used, and was returned, the government paying freight charges both ways. *Held*, that the Government was under no legal obligation to accept and pay for the cable, the agreement made not having been reduced to writing, &c., as required by Sec. 3744, Rev. Sts. Card 5275, *November, 1898.*

**885.** Where the lowest bidder for a dredging contract proposed to use a dredging machine which had become the subject of a suit against the party for infringement of a patent, *advised* that if deemed proper to accept the bid and enter into a contract, a clause should be required to the effect that in the event of any legal proceedings by other parties against the United States or any of its officers or agents for the infringement of any patent or claimed patent, during the execution of the work, or afterward, the contractor shall hold the United States harmless and refund to it all expenses, damages and outlays of every

kind it may be subjected to on account of the same. And that if said proceedings tend to create delay in the execution of the work, the United States shall have the right to immediately employ other parties to complete the same, the contractor to reimburse the United States for any extra amount it may have to pay for such completion over and above the amount which the contractor would have been entitled to for the same work. Card 725, *December, 1894*.

886. Under Secs. 3679, 3732 and 3733, Rev. Sts., public contracts for supplies, &c., for which money has been appropriated by Congress, cannot legally be made to extend beyond the fiscal year for which the appropriations have been provided, or to bind the government to the payment of any sum or sums not embraced in such appropriations. XXXI, 40, *November, 1870*; 392, *May, 1871*. Military contracts (including leases) will thus, where practicable, properly be made to run concurrently with the fiscal year in or for which they were made.<sup>1</sup> XXXV, 613, *October, 1874*. So held that a contract of lease made for a term of years (as three, five, or ninety nine years), at a certain stated rent, would be in derogation of the existing law (Sec. 3679, Rev. Sts.), and, unless specially authorized by statute, inoperative, even though providing that future rents should not be payable unless appropriations were actually made for their payment.<sup>2</sup> And advised that, where it is desired to occupy the premises for a longer term than one year, a lease should be taken to the end of the current fiscal year at a certain rent, and then a new lease be entered into for the next fiscal year, and so on; a lease *de novo* being necessary for each fiscal year, though the successive leases be mere repetitions and extensions of the original lease and though it be expressly stipulated in the original lease that the United States shall have the privilege of such extensions if desired. XXXII, 642, *May, 1872*; XLIII, 98, *November, 1879*; XLII, 677, *June, 1880*. So held that a lease of land at a certain rent, for an *indefinite* term, would not, in the absence of specific statutory authority, be legal or operative beyond the end of the existing fiscal year. XXXVI, 315, *March, 1875*. So of a proposed contract by the United States for the use (for a fixed compensa-

<sup>1</sup> See *Curtis v. United States*, 2 Ct. Cls., 144, 151; 4 Opins. At. Gen., 600, 9 *id.*, 18.

<sup>2</sup> See the opinion of the Attorney General in the case of the "Fifteen per cent. Contracts" (15 Opins., 235), where it is held that, in view of the provision of Sec. 3733, Rev. Sts., a contract for a public building cannot "be binding so far as to oblige itself to future appropriations even if it is subject to the contingency that such appropriations shall be made." And an opinion of Atty. Gen. Mason is referred to, where a contract of this class proposing to bind the Government to payments in advance of appropriations "was held to be of no validity, even though it provided that such contract should depend for its validity upon the contingency that an appropriation should be made and such appropriation was in fact thereafter made." And similarly held in the further opinion in regard to the same contracts, in 15 Opins., 235, 253. See, also, 5 Comp. Dec., 968.

tion) of a ferry or of telephones for an indefinite period. XLII, 454, *December, 1879; Card 4722, August, 1898.*

But *held* that the provision of Sec. 3679, Rev. Sts., the main object of which was to protect the United States from arbitrary expenditures and improvident pecuniary obligations on the part of executive officials, would not preclude the taking from a citizen, by the authority of the Secretary of War, of a lease for five or more years, of land required for military purposes, where *no rent whatever* was reserved therein, or where the rent reserved was a mere nominal sum inserted by way of formal consideration—as one dollar per annum. XLII, 504, *April, 1880.*

887. Where an appropriation act for a certain fiscal year appropriated a certain sum for an arsenal, which was insufficient to complete the proposed edifice, *held*, in view of the provisions of Secs. 3679 and 3733, Rev. Sts., that the Secretary of War, or the ordnance officer in charge of the work, would not be authorized to enter into a contract for the building of the entire structure, but could legally contract only for the building of such portion as could be constructed for the amount appropriated.<sup>1</sup> XXXIX, 612, *July, 1878.*

888. Although public contracts cannot in general be made in advance of, or in the absence of, a proper appropriation for the purpose, or other special statutory authority, yet from this rule are expressly excepted, by Sec. 3732, Rev. Sts., military (and naval) contracts "for clothing, subsistence, forage, fuel, quarters, or transportation," which, however, it is added, "shall not exceed the necessities of the current year."<sup>2</sup> Such contracts may therefore be entered into irrespective of the adequacy of the appropriations, or entirely on credit, where Congress has omitted (as it did in the session ending March 4, 1877) to make any appropriations at all for the army for a fiscal year. But *held* that by the term "current year" was to be understood current fiscal year, and that, in the excepted cases, the military authorities could bind the Government by contracts only for *necessary supplies* for the fiscal year in which such contracts were made.<sup>3</sup> XXXVIII, 504, *March, 1877; XLII, 135, January, 1875.*

889. In view of the provision of Sec. 3732, Rev. Sts. (and see Sec. 3679),—until an adequate appropriation applicable to the subject has been made by Congress, there can be (except as specified in Sec. 3732) no contract entered into with regard to such subject, and properly no award or acceptance of bid. L, 388, *June, 1886.*

<sup>1</sup> See the opinion of the Attorney General in 15 Opins., 235.

<sup>2</sup> As to the *reason* of this statute, see the opinion of Nelson, J., in the case of *The Floyd Acceptances*, 7 Wallace, 666, 685.

<sup>3</sup> To a similar effect, see subsequent opinions of the Attorney General in 15 Opins., 124, 200.

890. Sec. 4 of the River and Harbor Appropriation Act of August 5, 1886, provides that "The Secretary of War shall prescribe such rules and regulations as may be necessary to secure a judicious and economical expenditure of the money herein appropriated." Regulations being inferior and subordinate to statute, this provision can authorize no departure from the statutory injunctions governing public contracts, as for example such as are contained in Secs. 3678, 3679, 3717 and 3732, Rev. Sts. And *held* particularly that such provision would not authorize a regulation permitting the aggregating in one contract of agreements for the supplying of the materials or labor required for a number of distinct works, since such a contract would be in contravention of Sec. 3717, Rev. Sts., prescribing a separate contract "for each class of material or labor for each work."<sup>1</sup> But *remarked* that sec. 5 of the act cited permitted a departure from the contract system whenever any other method is more economical and advantageous to the government. LIII, 7, *September, 1886*.

891. By the River and Harbor Act of September 19, 1890, the Secretary of War was authorized to enter into contract for a certain improvement of the Delaware River, "the work to be paid for as appropriations may from time to time be made by law." A contract was entered into for the whole work at a cost largely in excess of the appropriation available. It provided that when appropriations permitted, monthly payments should be made, ten per cent thereof to be "reserved," and that if payment be discontinued for a period of one year owing to lack of funds, the total amount reserved from previous payments should be paid to the contractor. On the question whether the amounts so reserved could be used in paying for work not yet appropriated for, *held* that to do so would involve a violation of the contract entered into, and would operate indirectly as a payment for work in advance of an appropriation therefor. Card 620, *November, 1894*.

892. Sec. 3733, Rev. Sts., provides that "No contract shall be entered into for the erection, &c., of any public building, &c., which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose." By an act of June 16, 1890, the Secretary of War was authorized to cause to be erected at the National Armory at Springfield, Mass., a building for machine shops, &c., not to cost over a specified total of about two hundred and twelve thousand dollars. By a subsequent appropriation act of the same year (of August 30, 1890) an appropriation was made of \$100,000 "to commence the erection" of the same building. As it was thus quite evidently contemplated by Congress that the further

<sup>1</sup> Such a contract is now permitted by sec. 2, act of Sept. 19, 1890 (26 Stats., 452).



cost of the building would be appropriated for in a succeeding year or years, *held* that a contract might (upon advisement, &c.) be legally entered into for the entire work of the erection of the building, for the full consideration named in the first act, without a contravention of the terms of Sec. 3733. 43, 375, *October, 1860.*

893. *Held*, that it would be legally authorized to enter into a contract for the construction, for the sum of \$2,130, of quarters for hospital stewards at Jefferson Barracks; the limitation of contracts for such quarters to a less sum by the act of February 24, 1891, being confined to the fiscal year to which that act pertained, and therefore no longer in force. 61, 101, *August, 1893.*

894. Sec. 3690, Rev. Sts., in providing that balances of appropriations for any fiscal year remaining unexpended at the end of such year shall not be applied to the "fulfillment" of any contracts except those "properly incurred during that year,"<sup>1</sup> expressly excepts "permanent or indefinite appropriations." The existing law (Sec. 1661, Rev. Sts.) makes a permanent appropriation of a certain sum annually "for the purpose of providing arms and equipments for the militia." *Held* that a balance of this appropriation, remaining unexpended on the last day (June 30th) of a certain fiscal year, could legally be used for the payment of a contractor in December following, under a contract entered into, in November, with the Ordnance department for the manufacture of an arm intended to be issued to the militia. XXXI, 85, *December, 1870.*

895. Under Secs. 3739-3742, Rev. Sts., it is illegal for an officer of the United States to enter into a contract or make a purchase of a firm or association (not incorporated) of which a member of or delegate to Congress is a member or in which one is pecuniarily interested.<sup>2</sup> XLII, 344, *June, 1879.*

896. The Army Regulations prohibit purchases by officers of the army "from any other person in the military service."<sup>3</sup> *Held* that this prohibition did not embrace civilians employed in the public service under the War Department, or in connection with the military administration, and therefore did not preclude the making of a contract by an ordnance officer, as representing the United States, with a civil employee at an arsenal, for the use of an invention patented by the latter.<sup>4</sup> XXI, 320, *April, 1866*; XLII, 308, *May, 1879.* (See §§ 956, 957, *post.*)

897. In view of the positive prohibition of Sec. 3737, Rev. Sts., that

<sup>1</sup> See 6 Comp. Dec., 815; *id.*, 898.

<sup>2</sup> That Sec. 3739, Rev. Sts., does not affect contracts made with persons who have been simply *deputed* members of or delegates to Congress, but have not actually become such by being *sworn in*, see opinion of the Attorney General in 15 Opins., 280.

<sup>3</sup> See A. R., 1062 of 1863; 1652 of 1881; 746 of 1889; 589 of 1895; 671 of 1901.

<sup>4</sup> See *United States v. Burus*, 12 Wallace, 246, 251, 10 Opins. At. Gen., 2, 20 *id.*, 329.



no contract or interest therein shall be transferred by the contractor, and the further provision that any such transfer shall operate as an annulment of the contract, "so far as the United States are concerned," *held* that an officer of the army representing the United States in a contract for military transportation, would not be authorized, of his own discretion, to consent or waive objection to an assignment, in whole or in part, of a contract, by the contractor, so as to admit the assignee to perform the service.<sup>1</sup> XXXI, 436, *June, 1871*; XXXVII, 13, *May, 1875*.

898. Where a contract has been once formally entered into with a certain party, for the officer representing the United States to assume to admit additional parties into the agreement and undertaking (thus in fact consenting to a transfer by the contractor of an interest in the contract) would be wholly unauthorized. XXXVI, 463, *May, 1875*.

899. A mere power of attorney given by a contractor to another person authorizing him to receive for the contractor moneys coming due under the contract, cannot of course operate as a transfer of an interest therein; but where, by a written agreement between a contractor and another party, the latter was empowered to receive the payments from the United States, in consideration of which he undertook to continue and complete the work contracted for, *held* that such agreement was a power coupled with an interest, and operated as a transfer within the meaning of Sec. 3737, Rev. Sts.<sup>2</sup> XXVIII, 346, *January, 1869*.

900. Under Sec. 3737, Rev. Sts., the assignment of a contract does not render it absolutely void, but voidable at the option of the United

<sup>1</sup>That an assignment of a contract transfers no legal claim or right of action to the assignee, and that a contract when assigned is no longer binding upon the United States, see *Wheeler v. United States*, 5 Ct. Cl., 504; *Wanless v. United States*, 6 *id.*, 123; *Gill v. United States*, 7 *id.*, 522; *McGord v. United States*, 9 *id.*, 155; *Francis v. United States*, 11 *id.*, 638, 10 Opins. At. Gen., 523. But it has been held by the Attorney General that the statute on the subject (Sec. 3737, Rev. Sts.) is intended simply for the benefit and protection of the United States, which, therefore, is not compelled to avail itself of a transfer by the contractor to annul the contract, but may recognize the same and accept and pay the assignee. "Were it to be held," observes the Attorney General, "that a transfer of an interest would absolutely void the contract, it would enable any party making a contract with the United States to avoid it by simply transferring an interest therein, which is a construction manifestly inadmissible." Opinion in the case of the "Fifteen per cent. contracts," (15 Opins., 235.) And similarly held by the same authority in a later opinion (16 Opins., 277) that while the United States may avail itself of an assignment to declare the contract annulled, it is not required to do so, but, if deemed to be for its interest, may recognize the assignee. But it is clear that an officer of the army could not properly assume to treat an assignment of a contract (or interest therein) as valid, without the authority and direction of the Secretary of War. That for a mail contractor to contract with another person to transport the mail for him, and as his servant or employee, without an assignment of his contract with the United States, was held in the recent case of *Frye v. Burluck*, 67 Maine, 408.

<sup>2</sup>That a power coupled with an interest is irrevocable, see *Hunt v. Ennis et al.*, 2 Mason, 241; *Wheeler v. Knaggs*, 8 Hammond, 169; *McDonald v. Admr. of Black*, 20 Ohio, 185; 7 Opins. At. Gen., 35.

States.<sup>1</sup> Where the Government accepts from the assignee work or materials under the contract, or permits a part performance, it ratifies the assignment.<sup>2</sup> 16, 1, *April, 1887*; Card 2933, *February, 1897*. Where the War Department assented to the transfer of a contract for the manufacture of ordnance from one iron works to another and accepted deliveries from the latter, *held* that the contract remained in full force. 16, 1, *supra*.

901. The expression in a contract that the contractor agrees "for ——— heirs, executors and administrators" is not essential. The personal representatives of a deceased contractor are entitled to carry out his contracts, and the estate, both personal and real, of such contractor is liable for his debts and contracts independently of the provisions of the contracts. The provision that the transfer of the contract or any interest therein "shall cause the annulment of the contract so far as the United States is concerned," being the words of the statute (Sec. 3737, Rev. Sts.), may properly be incorporated in the contract, but it would be better to substitute therefor the provision that "in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee," as more clearly expressing what is intended by the statute as construed by the courts. Card 2878, *January, 1897*.

902. An assignment, to have the effect of invalidating a contract, need not be express; nor need it be technical, formal, or written.<sup>3</sup> It may be evidenced by the various facts or circumstances illustrating the relations and intention of the parties. 62, 211, *November, 1893*.

903. It has been held by the Supreme Court<sup>4</sup> that Sec. 3477, Rev. Sts., which prohibits or makes null and void all transfers and assignments of claims against the Government does not apply to involuntary assignments in bankruptcy or even to voluntary assignments for the benefit of creditors and the reasoning applies with equal force to Sec. 3737, Rev. Sts.<sup>5</sup> So *held* that an assignment for the benefit of its creditors by the company under contract with the United States to build the Memorial Hall at West Point, N. Y., was not void under Sec. 3737, Rev. Sts. Card 2828, *December, 1896*. Further *held* that where there had been an assignment for the benefit of creditors, payments due or becoming due on the contract should be made to the duly appointed assignee and could not legally be made to the assignors, and

<sup>1</sup> See 15 Opins. At. Gen., 235; 16 *id.*, 277; 18 *id.*, 88; also *Francis v. United States*, 11 Ct. Cls., 638, 2 Comp. Dec., 49; 4 *id.*, 43; 6 *id.*, 88.

<sup>2</sup> See *Wheeler v. U. S.*, 5 Ct. Cls., 504, 2 Comp. Dec., 49.

<sup>3</sup> *Francis v. U. S.*, 11 Ct. Cls., 638.

<sup>4</sup> *Erwin v. U. S.*, 97 U. S., 392, and *Goodman v. Niblack*, 102 *id.*, 556.

<sup>5</sup> 2 Comp. Dec., 49.

that par. 1, Circ. 13, A. G. O., 1895, did not apply to such an assignment.<sup>1</sup> Card 2052, *February, 1896*.

904. Sec. 3737, Rev. Sts., does not apply to an assignment by operation of law. Thus where a party died pending the execution of a contract by him with the United States, *held* that his executors could legally be permitted to complete the contract after filing a certificate from the proper court of their appointment, but for them to assign the contract to others would be a violation of its terms and also of Sec. 3737, Rev. Sts. Card 5849, *February, 1899*. And where a bidder died before the contract was entered into, *held* that the contract and bond should be in the names of the executors of his estate as such executors. Card 8403, *May, 1900*.

905. The assignee of a party entering into a contract with the United States should sign the same as assignee, or if signed for him by an agent, the authority, in writing (under seal if the contract be under seal) of such agent should accompany the contract. Card 2446, *July, 1896*.

906. A receiver duly appointed for a company having a contract with the United States may be permitted to execute the contract, payments being made to the receiver on receipts signed by him. Such action would not amount to an assignment of a contract prohibited by Sec. 3737, Rev. Sts. This section applies to voluntary transfers and not to such as are made under judicial proceedings. The receiver is an officer of the court which appointed him, acts under its orders, is appointed on behalf of all parties interested, and stands in the place of the company. And after his appointment the company can exercise no acts with reference to its property and contracts, such matters being in the hands of the receiver. Card 7508, *January, 1900*; 9247, *November, 1900*.

907. It is a general principle that after a government contract has been once duly consummated, the same cannot legally be modified as to any of its material stipulations by the consent of the immediate parties.<sup>2</sup> To agree to such a modification is in effect to make a new

<sup>1</sup> Concurred in by the Comptroller of the Treasury under date of Feb. 20, 1896.

<sup>2</sup> "The power vested in the head of an executive department to make contracts for work or materials does not imply the power to rescind or alter such contracts when made." 9 Opns. At. Gen., 80. "The authority to make a contract implies no authority to change it after it is made." *Id.*, 101. "When the contract is closed, the general rule is that it must be executed without change of terms. . . . The terms of contracts made by government officers are not in general subject to change at the will of either party, or of both parties. If they were, every legal guard against fraud and favoritism in making contracts could be easily evaded." 10 *id.*, 476, 480.

The later authorities, however, appear to favor the exercise, by the head of a Department, of a discretion to consent to modifications in the course of the execution of public contracts, where such modifications (not being in contravention of law) are found to be for the public interest, and are not of such a character as to operate to the pecuniary disadvantage of the United States. See *United States v. Gibbs Steam-Eng. Co.*, 1 Otto, 321, 15 Opns. At. Gen., 481; 21 *Cl.*, 207; 2 Comp. Dec., 182, 1 *id.*, 54; 4 *id.*, 38, 5 *id.*, 83; 7 *id.*, 92.

contract. Thus where a contract had been duly made and executed for the furnishing of a certain specified quantity of military stores, *held* that an agreement subsequently entered into between the contractor and the officer representing the United States, that the former should deliver and the latter receive, under the contract, a certain additional quantity of the same stores, was not merely a modification of the existing contract, but was in fact the making of a new contract, and this without a compliance with the formalities required by statute. And *advised* that the stipulation thus agreed to (but not in fact carried into effect) be rescinded as unauthorized and in contravention of law. *XLI*, 182, *April*, 1878.

908. Of course no new term or condition can be ingrafted upon a contract by the United States without the assent of the contractor. *29*, 324, *January*, 1889. Material changes made in a contract not stipulating for the same, by supplemental contract or otherwise, will operate in law to discharge the sureties on the contractor's bond unless they formally assent to the same, whether such change or changes be prejudicial to them or the reverse.<sup>1</sup> *30*, 116, *February*, 1889; *55*, 365, *September*, 1892. But where, in the course of the execution of a contract for the dredging of a river, there was developed certain work requiring to be done, which was not embraced in the work contracted for but was quite new and distinct, *viz.*, the removal of a bar formed in the river after the work under the contract had commenced—*held* that the same could not be included by consent in the existing contract, or covered by a supplemental contract entered into, without advertising, with the same contractor, though such course might be more advantageous to the United States, but that the law must be complied with by a new advertisement for proposals followed by a separate formal contract. *47*, 257, *May*, 1891.

909. Where a contract stipulates for a modification of its terms, by consent of parties, to be set forth in a supplemental contract, such supplemental contract must be confined to modification merely of the specific undertaking which is the subject of the original contract. A modification which introduces any new matter not originally contracted for as different and distinct work to be done or service to be performed—is a new and independent contract made without advertising for bids, and not legitimate.<sup>2</sup> So *held* that a contract for

<sup>1</sup>See *U. S. Glass Co. v. W. Va. Flint Bottle Co.*, 81 Fed. Rep., 963, where the court, while holding that the alteration in question was material, also held that an *innominate* alteration by the parties to a contract would discharge the sureties, if made without their consent.

<sup>2</sup>In an opinion dated August 13, 1895 (21 Opns., 207), the Acting Attorney General held that a *modification* of a contract, "where the interests of the Government will not be prejudiced or any statutory provision violated thereby," may be made, although it may be a departure from the advertisement for proposals, citing *U. S. v. Corliss Steam Engine Co.*, 91 U. S., 321, and *Ferris v. U. S.*, 28 Ct. Cls., 332, that a



dredging in North River and at North River Bar, North Carolina, could not legally be modified by a supplemental contract substituting dredging in Currituck Sound, a quite different locality. 64, 344, April, 1894.

910. Where an *extension* is authorized by the terms of a contract, the same—in a just case and where not pecuniarily disadvantageous or otherwise prejudicial to the public interests—may be granted in the discretion of the Secretary of War. In an instance of a contract for the erection of officers' quarters at a military post, where an extension of time, applied for, appeared to be equitable, *recommended* that it be granted with the condition that the United States waived no rights which might accrue under the contract by reason of the non-performance within the period originally stipulated. L, 519, July, 1886.

911. Similarly held where the contract provided for the construction of the Barnes Landing Levee, and the Warfield Point Levee, Mississippi, and it was proposed to enter into a supplementary contract for the erection of 40,000 cubic yards at Ingomar, Mississippi, instead of at Barnes Landing as already provided in the original contract, but *remarked* that if the work at Barnes Landing was not necessary as stated, so much of the original contract as provides for it may with the consent of the contractor and his sureties be annulled; or if the contractor will not consent to this action he may be notified that the work will not be done; and the United States would in that event be liable only for the damage he sustained in not being permitted to complete his contract. Card 475, October, 1894. So, where a contract for dredging had been made, and it was subsequently discovered that dredging was necessary at a place and of material different from those contemplated in the advertisement, *held* that a supplemental contract to cover such additional dredging would not be a legal modification of the original contract. Card 1454, June, 1895.

912. Upon the authority of the opinion of the Attorney General dated Aug. 13, 1895,<sup>1</sup> *held* that supplemental contracts were legal in the following cases: To provide for an additional expenditure to cover the cost of additional masonry, rendered necessary by the site of a quartermaster and commissary storehouse, not shown on the plans or provided for in the original contract for the building of the house. Card 2705, October, 1896. For additional excavation found necessary

provision for such modification "may well be provided for in every contract to which the Government is a party; and that a contract so modified is not such a new contract as must be preceded by an advertisement for proposals from bidders." See, also, 2 Comp. Dec., 373. The modification, however, must not be prejudicial to the interests of the Government. 2 Comp. Dec., 184, 242, 635; 4 *id.*, 30; 7 *id.*, 92.

<sup>1</sup> See preceding note to § 909, *ante*.



in the construction of a cofferdam, and piling foundation for a lock. Card 2927, *February, 1897*. To cover expense to contractor of maintenance, etc., during suspension of river and harbor work, directed by the engineer officer in charge on account of high water and to prevent damage to the levee which the driving of piles, etc., by the contractor might have caused. Card 2927, *June, 1897*. To substitute in the wings of a lock 800 round piles 60 feet in length for that number 50 feet in length. *Id.*, *July, 1897*. To provide for necessary "rock excavation," the original contract providing for "common excavation" only. Card 5244, *November, 1898*.

913. A contract for the construction of a portion of a lock on Osage River, Mo., was duly made, but after the contract was entered into improvements in the Missouri River changed the point of the junction of that stream with the Osage River, thus making it necessary to lower the lower miter sill of the lock about five feet. This rendered the original plans no longer applicable. It was proposed to buy out the contractor and complete the work without contract; this in view of the River and Harbor Act of Aug. 11, 1888, which provides "that it shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for improvement of rivers and harbors, other than surveys, estimates and gaugings, in carrying on the various works, by contract or otherwise as may be most economical and advantageous to the Government." *Held*, therefore, that a supplemental contract providing 1, for terminating the contract; 2, for paying for work already done; 3, for purchasing the plant, lenses, privileges, etc., would be legal with respect to terminating the original contract and paying for work already done, and also legal with respect to the purchase of the plant, etc., if the practice under the statute cited, of extending it to purchases of supplies, etc., used in "carrying on river and harbor works," be accepted as correct. Card 2275, *May, 1896*.

914. A contract was made for the earth work construction of "mile 24," Illinois and Mississippi Canal. At the time the specifications of the contract were prepared it was assumed that the work could be done by building part of the embankment with the clay and gravel from the high grounds at the east and west ends of the mile in question, this method appearing to be perfectly feasible and practicable from the test borings which had been made. The latter were, however, made in very dry weather. During the rainy season which followed further examination developed that the mile for two thirds of its extent was a peat bog of great depth. The construction outlined in the specification could not be successfully executed except by excavating this peat from the greater part of the mile and then making the slopes and bottom of good water-tight clay and gravel which could not be

obtained on the mile. The changed conditions rendered it desirable that the Government should not enforce the construction outlined in the specifications, and induced the contractors to ask that the contract be annulled without prejudice to them. *Held*, that there was no legal objection to a supplemental contract annulling the original contract as indicated. Card 5195, *December, 1898*.

915. A contract was made for the construction at Fort Hancock, N. J., of thirty two buildings and one double bake oven at a stated price for each building, etc., the prices aggregating a stated amount. The contract provided that the payments should be made at such times and in such amounts as the officer in charge of the work should elect, based upon estimates to be made by him of completed work, and that twenty per centum of each payment should be retained until the final completion and acceptance by the Government of all the work under contract. After several of the buildings had been completed the Government occupied and continued to use them. On the questions whether the price for each building as itemized in the contract could legally be paid in full as soon as the building was completed, and as to the effect which the occupation of the buildings by the Government before final and full payment would have upon the responsibility of the contractor for the care of such buildings, *advised*, 1, that if it were desirable to make payment in full for each building when completed, a supplementary contract be made, with the consent of the surety, providing for such payments; and 2, that the unexplained occupancy by the Government of the buildings would probably amount to an acceptance of them and thus relieve the contractor of responsibility therefor. Card 4825, *August, 1898*.

916. Where the progress of a contractor in the performance of important work, contracted to be done by him in connection with the improvement of the Savannah River, was quite unsatisfactory, and the alternative under the terms of the contract appeared to be either the absolute annulment of the contract by the United States, or the supplementing of the operations of the contractor by work carried on by the engineer department of the army, the contractor paying the extra expense if any - *held* that a supplementary contract made with him to the effect that the engineer officer in charge of the improvement should render him *aid* in the performance of the work, charging to him the actual cost of such aid and deducting it from the payment to be made him under the contract, was without legal objection. 62, 451, *December, 1893*.

917. While the Secretary of War is without jurisdiction to adjust and pay unliquidated damages for an alleged breach of a contract by the Government, he may, where it would be *to the public interest* to

do so, discontinue a contract between the United States and another party and relieve both parties from all obligations under the same for a consideration, by entering into a supplemental contract for that purpose, which would be binding on the United States.<sup>1</sup> Card 3969, *April, 1898*.

918. A debt due to the United States is public property and cannot be surrendered or its payment waived by an executive officer in the absence of authority from Congress. So *held* that the Secretary of War was not empowered to release a contractor from a pecuniary liability incurred by him for a delay or other neglect in duly performing his contract, and expressly defined and agreed upon therein as "liquidated damages"<sup>2</sup> (XXXVII, 442, *March, 1876*; XXXIX, 341, *December, 1877*); or to allow a contractor, in settlement, after a failure fully to perform his contract, a certain *percentage* of payments, stipulated in the contract to be withheld from him in the event of such failure (XXVIII, 346, 605, *January and May, 1869*; XXXI, 93, *December, 1870*; XXXVII, 441, *March, 1876*; XXXIX, 341, *December, 1877*); or to omit to charge a contractor with the *difference* between the contract price and the price which the Government was obliged to pay in supplying by purchase in the market articles failed to be furnished according to the contract, where it was expressly stipulated in the contract that the amount of such difference should be charged against the contractor. XXXII, 6, *May, 1871*; XXXVII, 437, *March, 1876*. And *held* that the fact that the failure of the contractor was due not to his fault, but to hardship or misfortune, could not add to the authority of the Secretary of War in the matter.<sup>3</sup> XXXVII, 437, *supra*.

But where the contract does not state whether the sums to be forfeited are to be regarded as penalties or as liquidated damages, and where the actual damages are capable of ascertainment, the forfeiture may be treated as a penalty from which to indemnify the United States for the actual damages if any, and the excess over such actual damages may be remitted.<sup>4</sup> Cards 652, *June, 1895*; 1960, *May, 1896*; 6407, *May, 1899*; 6684, *July, 1899*.

<sup>1</sup>U. S. v. Corliss Engine Co., 91 U. S. 321; Satterlee v. U. S., 30 Ct. Cls. 31; 3 Comp. Dec., 54, 6 *id.*, 953.

<sup>2</sup>Where a contract is to be treated as stipulating for liquidated damages, the amount of such damages cannot be remitted. 21 Opns. At Gen., 28; 3 Comp. Dec., 282; 5 *id.*, 315, 597, 6 *id.*, 748. But where it provides for a penalty, only actual damages can be withheld. 2 Comp. Dec., 579; 4 *id.*, 217. As to whether the provisions of a contract should be treated as stipulating for a penalty or for liquidated damages, see 34 Ct. Cls., 205; and 3 Comp. Dec., 282, and authorities cited. The inclination of the courts is to treat a sum to be withheld under the provisions of a contract as a penalty, from which actual damages only can be deducted; but where the amount withheld is reasonable and the actual damages are incapable or difficult of exact ascertainment, a stipulation for liquidated damages will be sustained as such. 34 Ct. Cls., 205; 3 Comp. Dec., 282, 4 *id.*, 217.

<sup>3</sup>See 2 Opns. At Gen., 481, 9 *id.*, 81.

<sup>4</sup>4 Comp. Dec., 217; 21 Opns. At Gen., 28.

919. The reserved ten per cent is a penalty intended to secure the United States against any damage resulting from a failure to perform the contract. The Government is not entitled to retain more than the amount of the actual damage.<sup>1</sup> L, 361, *June, 1886*. Where, though not a complete execution, there was yet a substantial performance, the contract not having been legally annulled by reason of a failure to give the notice of annulment stipulated for, *held* that the percentage should not be reserved but paid to the contractor. 34, 232, *August, 1889*.

920. Where a contractor, in the event of non-performance, was to be "charged" the sum of \$1000 as a "penalty," to be deducted from the moneys due him under the contract, it was *held* that this amount was not liquidated damages, but penalty as described, and, inasmuch as (in the particular case) there was in fact no damage, was not properly to be charged against the contractor on settlement.<sup>2</sup> 42, 328, *August, 1890*.

921. The contract for the construction of the Gymnasium at the Military Academy stipulated for the payment of an entire sum for the whole work, less a deduction of \$25 per day for the days during which the completion might be delayed beyond a certain specified date. The building not having been completed at such date, *held* that the Secretary of War was not empowered to waive any part of the forfeiture, the same being liquidated damages, not penalty.<sup>3</sup> 62, 353, 418, *November, 1893*.

922. Where contracts for buildings at the Soldiers' Home provided for the completion of the buildings on certain dates and stipulated for the deduction of \$25 per day as *liquidated damages* for each day thereafter until the buildings should be completed, *held* that as the contracts clearly stipulated for liquidated damages, and as the amount was reasonable and the probable loss to the United States was difficult of ascertainment, such amounts were to be treated as liquidated damages, and the Board of Commissioners of the Home had no authority to remit such damages. Card 7314, *November, 1899, March and October, 1900*.

<sup>1</sup> U. S. v. Quinn, 99 U. S., 30, 15 Opns. At Gen., 418.

<sup>2</sup> Taylor v. Sandford, 7 Wheaton, 13; Taylor v. The Marcella, 1 Woods, 302. And see 20 Opns. At Gen., 511.

<sup>3</sup> See Texas, & R. Co. v. Rust, 19 Fed. Rep., 239; Am. & Eng. Ency. of Law, 1st edition, vol. 5, p. 25.

In this case, however, Attorney General Olney under date of May 28, 1894 (21 Opns., 28), held the stipulation to be for a penalty, and remarked as follows: "Inasmuch as the forfeiture or penalty incurred here was one imposed by the contract between the parties and not by any act of Congress, and the work contracted for has all been finished according to the contract and no actual damage has resulted to the United States, and the penalty is one from which, in like cases, a court of equity would grant relief, I am of opinion that the Secretary of War has authority to remit the forfeiture provided for in the contract and to order payment of the entire sum withheld from the contractor."



923. A head of a department, in the matter of the making and execution of a public contract, acts as an agent of the United States and cannot legally relinquish any pecuniary right of his principal. In the absence of express statutory authority, an executive officer is not empowered to release an ascertained debt due to the United States. LII, 197, *May, 1887*; 57, 122, *December, 1892*.

924. Where it was covenanted in a contract that ten per cent of each partial payment should be withheld until the completion of the contract, *held* that this reservation could not be continued so as to apply to payments under a second contract by which the agreement of the contract containing the covenant was in fact extended. This for the reason that the second contract, though an extension of the first, was in law and fact a *new* contract, and could not therefore be affected by a condition expressly limited in its operation to the life of a previous contract which had been fully completed. XLI, 625, *July, 1879*.

925. Extra work performed under a contract not in terms contemplating such work, or providing as to the price or rate to be paid for it, must be considered as having been voluntarily rendered under the contract.<sup>1</sup> 63, 180, *January, 1894*.

926. The Secretary of War, in the absence of authority from Congress, is not empowered, whatever be the merits of the case, to release a contractor from the due performance of his contract,<sup>2</sup> or to relieve or compensate him on account of losses suffered by him in fulfilling or attempting to fulfill his contract, where there has been no breach on the part of the United States.<sup>3</sup> In such a case Congress alone can grant relief. XXXVII, 440, *March, 1876*; 62, 367, *November, 1893*; Card 2492, *June, 1896*.

927. The Secretary of War is not authorized to release a contractor from his contract, on the ground that he has encountered unexpected difficulty in completing it, or that its execution will involve a material pecuniary loss. He can not relieve a contractor from a bad bargain.<sup>4</sup>

<sup>1</sup> But where the extra work or materials are ordered or contracted for, payment therefor may be made. 1 Comp. Dec., 481, 6 *id.*, 769; 7 *id.* (dated January 22, 1901).

<sup>2</sup> See Opinion of the Attorney General in 15 Opins., 481.

<sup>3</sup> In an opinion addressed to the Secretary of War, in regard to an application for relief by a contractor for work on the Washington Aqueduct, Atty. Gen. Black (10 Opins., 81) remarks as follows:—"He now says he is doing the work at a loss, and asks you, in a memorial, either to give him a larger compensation than he bargained for, or else to release him from the contract. You have no authority to do either of these things. You cannot absolve him from his obligation to do the work; and, if he does it, you cannot authorize him to be paid for it at higher price than the contract stipulates for. \* \* \* In short you have no power to relieve him from the hardship he complains of, either by giving him damages, by releasing him from his present contract, or by making a new one. \* \* \* If the contractor quits the work, or otherwise violates the covenants he has made with the Government, he must do so at his own peril and that of his sureties."

<sup>4</sup> 2 Opins. At. Gen., 482, 9 *id.*, 80, 15 *id.*, 481; 17 *id.*, 370.



L. 76, *February, 1886*; 57, 122, *December, 1892*; 63, 27, *December, 1893*; Card 2569, *September, 1896*. A contractor, because he is losing money, cannot be allowed to be released upon a new man being substituted who will undertake the contract at the same rate. L. 76, *ante*.

928. A supplemental contract releasing a contractor from a contract for dredging a channel, because to insist upon its completion as agreed would be a hardship<sup>1</sup> the supplemental contract stipulating that the contractor should be paid for the work actually performed provided he first remove his plant from the channel—*held* unauthorized and void. 63, 23, *December, 1893*.

929. The Secretary of War is not authorized to release a contractor from the execution of his contract, unless, by action of the elements or other overpowering cause, performance is rendered practically impossible. *Held* that a contract duly made for the removing of a wreck in Charleston harbor, rendered difficult of completion by stormy weather, the action of the tides, &c., could not legally be allowed to be superseded by a supplemental contract for partially breaking up the wreck, entered into with the same party, without advertising, &c. 63, 256, *January, 1894*.

930. A contractor may be excused from performing his contract where its execution has been rendered impossible by an *actus Dei*, or cause which could not possibly be attributed to himself;<sup>2</sup> as where, by reason of an excessive and prolonged drought and consequent failure of the grass crop, the completion of a contract to deliver hay at a military post was rendered impracticable. Where full performance is thus prevented, without fault of the contractor, he is entitled to be paid for the deliveries actually made. 32, 444, *May, 1889*; 56, 259, *October, 1892*.

931. But where a contractor, expressly and without condition or reservation, engages to perform a specific work or service, he is bound by his contract, although its execution prove to be beyond his power, if within the scope of private exertion to accomplish. As where one contracted to remove the boiler of a steamer wrecked in Chesapeake Bay, but, after extended search, was unable to find it—*held* that he could not legally be paid the amount stipulated in the contract.<sup>3</sup> 39, 330, *March, 1890*.

932. A contract establishes rights between the contracting parties, and an executive officer would have no authority to give away the contract rights of the United States. So *held*, where a contractor applied to be paid the difference between the contract price and the amount he

<sup>1</sup> Satterlee, 1 U. S., 30 Ct. Cls., 31.

<sup>2</sup> 2 Parsons on Contracts, 672; 1 Wharton on Contracts, § 314.

<sup>3</sup> See 1 Bishop on Contracts, § 591, *The Harriman*, 9 Wallace, 101, 172; *Boyd v. U. S.*, 15 Wallace, 17, 22.

actually expended on the work, that the Secretary of War could not authorize such payment. Card 2402, *June, 1896*.

933. Where a contract is not ambiguous or technically obscure, parol evidence is not admissible to establish a new term or add an understanding at variance with its written stipulations.<sup>1</sup> Thus where, prior to the execution of a contract, the officer acting for the United States advised the contractor that it would be necessary to deduct from the whole amount to be paid him certain sums which would be required to be disbursed by the Government for certain clerical work and the employment of certain assistants, but failed to insert in the contract any stipulation for such deduction *held* that the written contract represented the consummation of all previous negotiations and the final act of the parties, and that the United States was estopped from setting up, by parol evidence, the existence of an understanding that such deduction should be made. L, 488, *July, 1886*.

934. Where, after a contract for quartermaster stores had been duly subscribed and entered into by and between the lowest bidder and the proper official representative of the Government, it was ascertained that the former had failed fully to perform a certain contract sometime previously made between himself and the United States, *held* that this fact could not authorize the Secretary of War to cancel the contract thus formally executed and enter into a new contract with another party. XLI, 258, *June, 1878*.

935. Where a vessel was duly chartered from the owner by the Quartermaster Department, to carry coal from Philadelphia to Key West at a certain freight, and while *en route* was stopped at the Delaware Breakwater by the military authorities, and compelled, against the protest of the master, to discharge her cargo at Fort Monroe, *held* that the United States was legally bound to pay to the owner the full freight to Key West according to the terms of the contract. XX, 491, *March, 1866*.

936. A breach of some term of the contract, as, in a case of a contract for supplies for the army, a failure to deliver some of the articles at the agreed time, will not ordinarily, in the absence of an express covenant to that effect, authorize the Secretary of War to declare the contract annulled, but will only give the United States a right of action for damages. An unreasonable delay, however, to commence the delivery under such a contract, indicating an abandonment on the part of the contractor, will justify the Government in treating the engagement

<sup>1</sup> Bradley v. Packet Co., 13 Peters, 89; Willard v. Taylor, 8 Wallace, 557; Partridge v. Insurance Co., 15 *id.*, 573; Maryland v. Railroad Co., 22 *id.*, 105; Forsythe v. Kimball, 91 U. S., 291; U. S. v. Peck, 102 *id.*, 44; 1 Greenleaf Ex. § 275; 2 Wharton, Law of Contracts, § 661; Wald's Pollock on Contracts, 458.

as relinquished, and will release it from the obligation to make payment. 29, 324, *January, 1889*; 34, 261, *August, 1889*.

937. It appears to be established that, in settling with a contractor under a duly executed contract, there may be set off against the amount due *to* him an amount due *by* him as *liquidated damages* under the terms of another contract which he has failed to perform.<sup>1</sup> But where the amount due from the contractor is not liquidated by the contract, the Government can have no right to insist that a certain sum fixed by itself as properly due from the contractor shall be set off against the amount due *to* him.<sup>2</sup> XXXII, 257, *January, 1872*. So where the Navy Department had supplied a construction company (under contract with the War Department at the time) with fresh water at the cost of distilling, the amount aggregating \$431.86, and was unable to collect the same, it was *held* that the amount stated could be withheld from monies due or to become due the company under its contract with the War Dept. Card 6841, *August, 1899*. And where a dredging company failed to perform its contract with the Navy Dept., *held* that an amount sufficient to cover the loss to the U. S. caused by such failure might be withheld from monies due the company under its contract with the War Dept. pending settlement with the Navy Dept. by judicial proceedings or otherwise.<sup>3</sup> Card 8973, *September to November, 1900*.

938. Where, in the settlement of the account of a railroad company under a contract for military transportation, there was set off in the Quartermaster Department against the amount due the sum of certain amounts regularly and voluntarily paid by the United States to the company for transportation some five years previously on the ground that these amounts were in excess of the usual rates, *held* that such offset was without sanction of law and unauthorized, there being no evidence of fraud on the part of the contractor in obtaining the payments, or of collusion between him and the officers who represented the United States in receipting the accounts and making payment. XXXV, 291, *March, 1874*.

939. There are three cases in which offsets are authorized: 1. A case of a claim and a counterclaim arising under the same contract. 2. A case of forfeiture of liquidated damages under an earlier contract sought to be deducted in a settlement had on a later one. 3. A case

<sup>1</sup> See 4 Opns. At. Gen., 554, 11 *id.*, 120; 2 Comp. Dec., 129; 6 *id.*, 345; 7 *id.*, 213.

<sup>2</sup> If the parties cannot mutually agree upon a balance, the proper course will in general be for the Secretary of War to decline payment until the account shall be adjusted by the Court of Claims, which has jurisdiction of all offsets and counter claims on the part of the United States against contractors and claimants. See Sec. 1509, Rev. Sts., 2 Comp. Dec., 429.

<sup>3</sup> See Decision of the Comptroller of the Treasury, dated Nov. 16, 1900, 7 Comp. Dec., 213.

of an amount paid to a party under a mistake of fact,<sup>1</sup> proposed to be withheld from a subsequent payment due the same party. In either of these cases the principle of set-off may legally be applied in a settlement with a contractor. 44, 18, November, 1890.

940. Where a *prima facie* claim for loss to the United States by the sinking of a steamboat on the Missouri River, existed against a contractor for transportation, and the Government was indebted to him on an account arising out of other contracts, *advised* that the sums due him be withheld until a balance should be mutually agreed upon, or till the accounts should be judicially adjusted (under Sec. 1059, R. S.) upon his resorting to proceedings in the Court of Claims. 36, 398, November, 1889.

941. In a settlement with a contractor the officer representing the United States would not be authorized to pay over, to a civil official holding process of attachment or execution from a State court against the contractor, the amount of any debt or debts due by the contractor to a creditor or creditors. Payment must be made to the contractor personally, or to his agent or attorney, according to pars. 724, 726, A. R. of 1889. 63, 292, January, 1894.

942. Payments due on a contract with the Government, where the contractors are partners, may legally be made to any member of the firm, notwithstanding one of them may have filed a protest and notice against payment to one of the partners.<sup>2</sup> Card 3210, May, 1897.

943. Where, in a contract for the construction of a lock and dam, in the improvement of a river, it was provided that the engineer officer in charge might, in his discretion, pay for the stone when delivered dressed in advance of the time for putting it into the work *held* that the delivery was complete when the stone was fully dressed and ready for use in the stoneyard and the officer representing the United States in the improvement was duly notified of the fact and requested to take the stone; and that it was entirely unnecessary that the United States should have any title to or usufructuary interest in the land of the stoneyard, and immaterial who was the owner or in possession of the same. 64, 225, March, 1894.

944. A sub-contractor cannot, by injunction or otherwise, restrain the Secretary of War, or a military officer, from paying the entire consideration of the contract, or so much as may be due and payable, to the contractor. There is no privity of contract between the Government and a sub-contractor and he has no legal claim whatever upon

<sup>1</sup> An offset may also be made for an overpayment due to a mistake of law, as the Government is not bound by such mistake. See note to § 1941, *post*.

<sup>2</sup> *Novess*, New Haven, New London, and Stonington, R. R., 40 Conn., 14, 15; *Limbley on Partnerships*, 218; *American and Eng. Encyclopedia of Law*, 1st ed., vol. 17, 908.



the United States for any part of the contract money. He must look to the principal contractor for the payment of anything that may be due him. LII, 194, *May, 1887*.

**945.** Material-men could have claims upon the United States only as sub-contractors and by virtue of having succeeded to the rights of the original contractor by being in a sense substituted for him in the contract. But this would be in contravention of Sec. 3737, Rev. Sts., since it would amount to a transfer to the sub-contractor of an interest in the contract. This section was intended for the protection of the United States, and to secure it from the necessity of having to decide controverted questions of liens and assignments, and must be held to apply to indirect as well as direct transfers. To recognize a lien on the part of a sub-contractor would be to sanction an indirect transfer of an interest in a contract, which is prohibited. 29, 210, *January, 1889*; 48, 341, *August, 1891*.

**946.** *Held* that a sub-contractor for building materials furnished a government contractor at Fort Riley, Kansas, could not enforce a lien against the United States under the statutes of that State. This, for the reasons—in addition to that set forth in the preceding paragraph—1st. That the State law requires that the lien be prosecuted in the State district court, a tribunal in which the United States is not suable. Thus the remedy cannot be pursued against the United States as owner of the buildings. 2d. That public policy forbids the obstruction of the legal operations of the United States by State legislation or process. 29, 210, *January, 1889*.

**947.** There is no law of the United States which authorizes an interference, by means of a material man's lien, with an instrumentality of government in the District of Columbia. Soldiers' Homes are instrumentalities of government. *Held*, therefore, that a mechanic's (material man's) lien filed against the amusement hall at the Soldiers' Home, Washington, D. C., could not be recognized as a ground for withholding payments due the contractor who had built it. Card 2457, *July, 1896*.

**948.** A contract stipulated—according to a usual form—that the contractor should be responsible for and pay all liabilities incurred for labor or materials. After its execution certain sub-contractors who had furnished materials to the contractor applied to the Secretary of War for his consent to their suing the sureties on the contractor's bond, in the name of the United States, for their own use, for the sums claimed by them. *Held* that no such consent could legally be given, for the following reasons: 1. The contract had been duly per-

<sup>1</sup>See *Briggs v. A Light Boat*, 7 Allen, 287, 297, *McCulloch v. State of Maryland*, 4 Wheat., 319, 439.



formed. 2. If not performed, to yield the claim would be to part with a right of action, property of the United States, without the authority of Congress. 3. The contract did not authorize or provide for such a proceeding. The covenant referred to is inserted mainly to further a prompt performance and incidentally to protect the United States from being recurred to by the creditors of contractors. The failure to observe the covenant would doubtless give the United States a remedy in damages against the contractor and his sureties in case appreciable damages were suffered. But such damages, if any, would be wholly independent of the liabilities which the contractor might be under to his creditors and would not be measured by their amount. Thus *held* that the suit proposed could be instituted only by the authority of legislation.<sup>1</sup> 56, 265, *November, 1892*.

949. *Held* that the act of Aug. 13, 1894, protects persons furnishing labor or materials to sub-contractors as well as to the original contractor, but whether it does or not is a proper question for the courts to determine. *Advised*, therefore, that a party who had furnished material to a sub-contractor, he given a certified copy of the contract and bond upon filing the affidavit required by the act. Card 1908, *January, 1896*.

950. Under date of Oct. 9, 1895, a party entered into a formal contract with the United States for the construction of an addition to a building at Schuylkill Arsenal. He submitted two bonds, but both were rejected because not properly executed. In the meantime, he completed the work to the satisfaction of the Government, but owing to his failure to furnish a bond as required by the act of Aug. 13, 1894, for the protection of persons supplying labor and materials, no payments had been made under the contract. *Held*, that until such bond was filed no payment should be made; and that this rule would apply to the assignee of the contractor if one had been appointed. Card 4082, *May, 1898*.

951. *Held* that the certified copy of the contract and bond, to be furnished as provided in the act for the protection of persons furnishing materials and labor for the construction of public works, approved Aug. 13, 1894, should, in accordance with Sec. 882, Rev. Sts., be authenticated under the seal of the War Department in order that such copy may be in proper form for use as evidence. Card 1743, *September, 1895*. Having duly obtained such copy, the party may upon the authority of the statute institute suit as provided therein. The permis-

<sup>1</sup> Such authority has been given, since the date of this opinion, in the act of Congress of August 13, 1894, c. 280, by which persons supplying, to contractors for public works, labor or materials which have not been paid for, are authorized to be furnished with a copy of the contract and bond, and to bring suit on the same, in the name of the United States against the contractor and his sureties.

sion of the Secretary of War to institute such suit is not required. Card 2319, *May, 1896*.

952. The new obligation of the surety under the act of Aug. 13, 1894, does not create an additional obligation on the part of the United States in the nature of an equitable lien or other right. The United States is not required to withhold any funds due to a contractor for the purpose of indemnifying a surety for moneys paid out by him to material men and laborers.<sup>1</sup> For the United States to withhold, except for its own protection, payments due a contractor in order to pay therewith either liabilities on the part of the contractor or to indemnify his surety would be an assumption by the United States to insure the very payments which are intended to be secured by the provisions of the contract and the bond, and would cause the United States through the disbursing officers to adjudicate the matters of fact and law arising between contractors and their creditors. Cards 7311, *November, 1899*; 7726, *March, 1900*.

953. *Held*, in the absence of any statutory regulation of the subject, that the Secretary of War was not empowered to exercise control over the labor employed by the contractors for the work on the jetties at Galveston, Texas, or to prevent their availing themselves of the labor of convicts authorized by the laws of Texas to be hired out to contractors. The only statute of the United States relating to the use of such labor—that of February 23, 1887—merely makes it a criminal offence to hire out criminals incarcerated for offences against the United States, prescribing a penalty. But even this statute the Secretary of War has no authority to enforce, but the same is to be executed in the same manner as any other criminal statute of the United States.<sup>2</sup> 48, 492, *August, 1891*; Card 3542, *September, 1897*.

954. *Held* that there is no statute requiring or justifying the annulment of a contract with the United States on the ground that Italian labor was being employed in its execution. Card 4652, *July, 1898*.

955. Sec. 1164, Rev. Sts., making it the duty of the Chief of Ordnance to make contracts and purchases for ordnance and ordnance stores for the use of the army, is a general provision, enacted in 1815, and subject to be restricted and modified by subsequent specific legislation. Such legislation is the provision of the appropriation act for the Military Academy for 1892, for the purchase of certain ordnance and ordnance supplies, the effect of which is to place such purchase under the immediate control of the Secretary of War. So *held* that the dropping from this appropriation of the sum thus appropriated

<sup>1</sup> See 3 Comp. Dec., 708.

<sup>2</sup> The action taken on the case in second citation under this paragraph was "The Secretary of War will not consent to the use of convict labor."

and the placing of it to the credit of the Ordnance Department of the army, was an unauthorized proceeding and should be recalled. 57, 86, *December, 1892.*

956. Par. 746 A. R. (589 of 1895; 671 of 1901), to the effect that officers of the army shall not contract with other persons in the military service to furnish supplies or service to the Government, does not apply to contracts on behalf of the United States which require for their validity the approval of the Secretary of War.<sup>1</sup> A contract may therefore legally be made by the War Department with Captain Zalinski, U. S. Army, for the purchase of pneumatic dynamite guns of his invention. 31, 106, *March, 1889.*

957. On the question whether, in view of A. R. 589 (671 of 1901), an army quartermaster may enter into a contract with a retired officer of the army for the rent of rooms in a building owned by the latter, *held* that under the construction put upon this regulation by the Supreme Court of the United States,<sup>2</sup> the Secretary of War may authorize the contract in question to be entered into, in which event it becomes unnecessary to consider whether a retired officer is in fact "in the military service" within the meaning of the regulation cited. Card 2508, *August, 1896.* Similarly *held* with respect to a retired officer who as agent of a corporation desired to enter into a contract with the Government to furnish it military supplies. Card 4828, *August, 1898.* As the regulation is a prohibition proceeding from the Secretary of War to the officer or agent in the military service, it may be waived by the Secretary in a given case. So *held* that whether it should be waived where the contract was to be between a quartermaster of a volunteer regiment and a firm whose business it had been and was to furnish quartermaster supplies and of which the quartermaster had been and was a member, was a question for the Secretary of War to decide on the facts of the particular case. Card 4218, *June, 1898.*

958. An officer of the army is under no statutory incapacity to be a party to a contract with the United States, or to become connected

<sup>1</sup> The paragraph of the regulations cited is substantially the same as par. 1002 of the Regulations of 1863, and with reference to the latter the Supreme Court held (U. S. v. Burns, 12 Wall., 251): "That regulation does not apply to contracts on behalf of the United States which require for their validity the approval of the Secretary of War. Though contracts of that character are usually negotiated by subordinate officers or agents of the Government, they are in fact and in law the acts of the Secretary whose sanction is essential to bind the United States. The Secretary, although the head of the War Department, is not in the military service in the sense of the regulation, but on the contrary is a civil officer with civil duties to perform, as much so as the head of any other of the Executive Departments. It would be carrying the regulation to an absurd extent to hold it was intended to preclude the War Department from availing itself by purchase or any other contract of any property which an officer in the military service might acquire if its possession or use were deemed important to the Government."

<sup>2</sup> See note to § 956, *ante.*

with such a contract by acquiring an interest therein if the same relates to matters separate from his office and is no way connected with the performance of his official duties.<sup>1</sup> *Held* that par. 746 A. R. (589 of 1895; 671 of 1901), was directory merely, and that a contract might still be legal and binding though entered into in contravention of its terms. 43, 147, *October, 1890*.

959. The form of a proposed contract contained the stipulation that—“No person belonging to or employed in the military service of the United States is or shall be admitted to any share or part of this contract.” The description “person . . . employed in” is understood to mean all such clerks, mechanics, laborers, or other civilians as are legally employed by the military authorities in or in connection with military works, operations, or other authorized transactions. So where a lowest bidder was a civilian laborer at the Springfield Armory, *advised* that the contract be made with the next lowest bidder, who was under no such incapacity. 48, 375, *August, 1891*.

960. Where a contract was entered into between an army officer and a civilian, in which the former assumed without authority to bind the United States to operate for a term of six months a saw-mill on equal shares with the latter, the United States to furnish the principal part of the labor—*held* that such contract was void and inoperative. XLV, 13, *August, 1881*.

961. The act of July 5, 1892, authorizing the extension of the Eckington and Soldiers' Home Street Railroad on certain streets in Washington, D. C., provided that the company should before commencing the work deposit with the Treasurer of the United States, to the credit of the Washington Aqueduct fund, such sum as the Secretary of War may consider necessary to defray all the expenses that might be incurred by the United States in three separate matters, viz: 1, in connection with the inspection of the work of construction of said railroad on such streets; 2, in making good any damages done to the water mains, fixtures or apparatus; and 3, in completing any work that the said company may neglect or refuse to complete, which the Secretary of War may consider necessary for the safety of said mains, fixtures or apparatus. The act further provided for the disbursement of the money for the purposes stated and that it should remain on deposit subject to such use for one year after the completion of the construction of the railroad, the balance remaining to be returned to the company on the order of the Secretary of War. *Held* that the Secretary of War was without authority to return the money deposited or any part of it until the expiration of the period named in the statute. Card 806, *December, 1894*.

<sup>1</sup> 14 Opins. At. Gen., 482.



962. A party entered into a contract with the United States to do a certain amount of dredging between April 1st and Aug. 1st, 1895. The contract contained the following provision: "Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension shall be deducted from payments due or to become due the contractor." He did not begin work at the time agreed upon, but on his own application and the recommendation of the engineer officer in charge was given from Aug. 14, 1895, to Jan. 1, 1896, in which to do it. He worked from the 17th of Aug. through Sept., Oct., and Nov. On the question whether the amount paid by the Government for "superintendence and inspection" during the months last named should be deducted from payments due under the contract it was held that the deduction could not legally be made. There had not been an "extension" within the meaning of the contract. The work was to be completed during a specified period of four months, and during that length of time the Government had agreed to pay the expenses of superintendence and inspection. The later agreement changed the time at which the specified period should begin, but did not materially lengthen it. The extension contemplated by the contract was any period of time in addition to the four months, which the contractor might require to complete the work. Card 2400, *July, 1896*.

963. By act of Congress approved June 6, 1896, an appropriation was made "to enable the Board of Ordnance and Fortification to procure and test one eight-inch calibre high-power gun cast in one piece, on the plan of R. J. Gatling," and the Secretary of War was "authorized and directed to contract with said Gatling for said gun, without advertisement, which gun shall be constructed according to the plans and specifications prepared by said Gatling and under his supervision, and to be subject to the same test now applied to the built up gun of the same calibre \* \* of which sum eighty-five per centum shall be paid in partial payments as the work progresses in accordance with the contract to be entered into \* \* and the remainder upon the completion and test of said gun \* \* ." The gun was constructed in accordance with this act and the contract thereunder, and while being subjected to the endurance test of firing 300 rounds, it was destroyed as the result of the firing at the fifteenth round. The act did not contemplate that the final payment of 15 per cent should be made only after the gun had undergone the required test. The words "upon the completion and test of said gun" simply fixed a period for the final payment whether it underwent the test or was destroyed while undergoing it. In one sense of the word the gun had been tested, when in being subjected to the prescribed test, it was destroyed. As the act



made the appropriation "to procure and test" a new type of gun; as it authorized 85 per centum to be paid as the work progressed without any security for the return of the money, should the gun fail to stand the test; as it appeared from the whole act that the gun was to be constructed as an experiment; and as there was nothing in the act providing for a warranty on the part of the contractor—*held*, that the word "test" should be construed in the sense above stated, thus entitling the contractor to the payment of the fifteen per centum withheld.<sup>1</sup> Card 5700, *January, 1899*.

964. Certain contracts for forage provided that the oats and hay furnished should "be of the best merchantable quality of the highest recognized grade of the locality." *Held* that the language quoted simply furnished a standard by which the receiving officer was to judge the forage offered under the contract; that the term "locality" had reference to the towns and country in the vicinity of the post where the contractor could reasonably be expected to purchase the forage. State lines would have nothing to do with the matter, and no particular number of miles could be given as the distance to which the locality would extend. It has reference to the sources from which the forage could reasonably be obtained, that is, where the purchasing officer, the local quartermaster, would probably, in the exercise of good judgment, purchase in open market. Cards 1993, *January, 1896*; 2673, *October, 1896*.

965. Congress having imposed upon certain designated officials the duty of representing the United States in the making of the contract for the monument to Lafayette, *held* that the authority was personal and could not be delegated, and that all the officials named, or at least a majority of them, must sign the contract. L11, 363, *July, 1887*.

966. The implied authority of a partner to execute contracts for the firm of which he is a member does not extend to contracts under seal. Where a partner has given express authority to the other partners to execute contracts under seal, evidence of such authority should be submitted with the sealed instrument. Cards 2483, *January, 1897*; 5031, 5066, *September, 1898*; 6902, *August, 1899*.

967. Affidavits required to be taken in the execution of contracts pertaining to military administration may be taken before the military officers named in the act of Congress approved July 27, 1892. This act, having been passed subsequent to the enactment of Sec. 3745 Rev. Sts., modifies the latter to the extent stated. Cards 3671, *November, 1897*; 3746, *December, 1897*; 3768, *January, 1898*.

968. Money collected upon a contractor's bond as damages suffered

<sup>1</sup>Concurred in by the Attorney General under date of May 9, 1898.

by the United States in consequence of his failure to complete his contract must, under the provisions of Sec. 3617, Rev. Sts., be turned into the Treasury, and cannot therefore be applied to the work to which the contract pertained until it is so appropriated by an act of Congress.<sup>1</sup> Card 2527, *August, 1896*.

## COPYRIGHT.

**969.** The work entitled the "Infantry Drill Regulations," being in the hands of the Public Printer for printing and publication for the War Department, that official was authorized by the Secretary of War to sell electrotype plates of the same. A retired officer of the army purchased a set of such plates, and thereupon proceeded to publish the same, *copyrighting* the publication in his own name (prefacing it with his own portrait). *Held* that such act of attempted copyrighting was an unauthorized assumption and wholly nugatory in law. It is only the author or proprietor of a literary work who can legally copyright it, and he has the exclusive right to do so.<sup>2</sup> Nor did the fact that the publication by the purchaser was of a so-called "Abridgement"—substantially the original work somewhat reduced—constitute him an author or entitle him to copyright.<sup>3</sup> And *advised* that the "copyright," being without legal effect and void, could not affect the right of the United States to publish the complete work.<sup>4</sup> **50, 350, 373, December, 1891.**

**970.** Where an official of the War Department was allowed to compile and publish facts derived from records, the property of the United States, preserved in that Department for official and public use and reference, *held* that he could not legally copyright in his own name such compilation. **43, 294, October, 1890.**

**971.** An officer of the army prepared, in 1883, under orders from competent authority, a course of instruction in rifle and carbine firing which was submitted to a board of officers and after slight revision was approved by the Secretary of War for publication to and use by the army. The officer who originally prepared the instructions copyrighted the publication. Several years later other officers in their official capacity revised these instructions or regulations, which revision was approved and adopted by the Secretary of War. On the question whether the revised regulations could be published by the Gov-

<sup>1</sup> See Sec. 9, Art. I, of the Constitution.

<sup>2</sup> *Drone on Copyright*, 324; Sec. 4152, Rev. Sts.; and sec. 1, c. 565, act of March 3, 1891.

<sup>3</sup> *Gray v. Russell*, 1 Story, 11; *Drone on Copyright*, 158.

<sup>4</sup> See now sec. 52 of the public printing and binding act, Jan. 12, 1895 (28 Stats., 608).

ernment without an infringement of the existing copyright, it was *held* that the copy right was not a valid one for the reason that the officer who originally prepared the regulations did so in his official capacity, in the performance of his duties as an officer of the United States Army and under the salary paid him by the Government; that the regulations as originally prepared, considered, revised and adopted became the official public regulations for rifle and carbine firing in the army, and that therefore they could, as again revised by other officers in their official capacity, be printed by the Government for distribution to the army, without infringement of the copyright referred to.<sup>1</sup> Card 3433. *August, 1897.*

#### COUNSEL—IN CIVIL PROCEEDINGS.

972. Prior to the passage of the act of June 22, 1870, c. 150, "to establish the Department of Justice"—(see the provisions of secs. 14, 16 and 17 of the same, as now incorporated in Secs. 189, 361, 363, &c., Rev. Sts.), the head of an executive department was held to be authorized, under the general provision on the subject of the act of Feb. 26, 1853, to retain such counsel and avail himself of such professional advice as he might deem expedient, and upon such terms as might be agreed upon as reasonable and proper. Under this provision—in many cases arising during the civil war and subsequently—counsel were employed directly by the Secretary of War, or authorized by him to be employed, to defend officers, soldiers, and in some cases civilians serving with the army, in suits and prosecutions instituted against them, both in State and United States courts, for arrests made and acts done in the performance of duty under orders. In such cases, where the party was shown to have acted within the scope of his authority, or in the honest discharge of his duty under the orders of a proper superior (and, in cases of arrest, upon probable cause and without undue violence), it was usually recommended by the Judge-Advocate General that his defence be assumed by the United States, through the U. S. District Attorney, or some other counsel retained by the Secretary of War or authorized to be employed by himself, —with the further suggestion that the counsel be instructed to *remove* the case, when commenced in a State court, to a court of the United States, if practicable under the existing statute law. Where the party was shown to have exceeded his authority, or to have been actuated by personal hostility, or to have disregarded the directions of par. 1461 of the Army Regulations of 1861 and not reported the case with sufficient promptitude,

<sup>1</sup> *Wheaton v. Peters*, 8 Peters U. S., 591; Amer. & Eng. Ency. of Law, vol. 4, pp. 154, 158 (first edition).

his application for counsel was commonly recommended to be denied. I, 348, *September, 1862*; II, 16, *January, 1863*; III, 105, *July, 1863*; VII, 45, *January, 1864*; VIII, 51, 108, 130, *March, 1864*; X, 578, XI, 201, *December, 1864*; XIII, 509, *March, 1865*; XVI, 565, XVIII, 290, *October, 1865*; XXI, 197, *January, 1866*; XXIII, 121, *July, 1866*; XXIV, 135, *January, 1867*; XXVI, 248, *December, 1867*; 521, 536, *April, 1868*; XXIX, 458, *November, 1869*; XXX, 83, *February, 1870*; XXXIV, 65, *January, 1873*.

973. But, by the act of 1870, above indicated, the whole matter of the employment of counsel in cases of a public nature, and the settlement of their compensation, has been taken from the chiefs of the other executive departments and transferred to the Attorney General. Sec. 189, Rev. Sts. (derived from sec. 17 of said act), provides generally that—"No head of a department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice shall call upon the Department of Justice, the officers of which shall attend to the same." The subject is regulated in detail by Secs. 356 to 367, Rev. Sts.; and when an officer or soldier gives notice, as required by par. 1059, A. R. (968 of 1895; 1072 of 1901), of a suit or prosecution commenced against him for an act done in the due performance of a military duty and applies to be defended at the expense of the United States, the Secretary of War, if he deems the case to be one in which such action will be just and expedient, will refer the papers to the Attorney General for the proper action. XXXVIII, 99, *June, 1876*; 62, 32, *October, 1893*.

974. Where an attorney submitted to the War Department a claim for services rendered an enlisted man in a *habeas corpus* proceeding, no notice of such employment having been previously given, it was held that the employment and payment of the attorney were prohibited by Secs. 189 and 365, Rev. Sts., and further that in view of Sec. 366, Rev. Sts., payment of the claim could not be made except by special act of Congress.<sup>1</sup> Card 7256, *December, 1899*.

975. An action for damages was commenced against an officer on account of his having placed in confinement, as a deserter, a man who was in fact a discharged soldier. The man had been regularly turned over to him as a deserter, and it was his duty to receive and hold him. The officer applied for counsel, under par. 1057, A. R. (968 of 1895; 1072 of 1901). *Advised* that the application be referred to the Department of Justice for disposition.<sup>2</sup> 50, 363, *November, 1891*.

976. An officer proposing to bring suit in the Court of Claims,

<sup>1</sup> See par. 968, Army Regulations of 1895 (1072 of 1901).

<sup>2</sup> The Attorney General instructed the local district attorney to appear and defend in the case.



under Sec. 1059, Rev. Sts., for the amount of certain subsistence funds, for which he had been made responsible through the dereliction of a commissary sergeant, applied to the Secretary of War to detail an officer of the army to act as his attorney in the prosecution of the claim. *Held*, in view of the provisions of sec. 5498, Rev. Sts., that such detail could not lawfully be made.<sup>1</sup> 35, 452, *October, 1889*.

977. An officer made application for counsel to assist a sergeant of his company in bringing suit for false imprisonment against a civil official. As the imprisonment of the soldier did not arise from any matter connected with his public duties, *held* that the application could not be acceded to under A. R. 845.<sup>2</sup> LIII, 175, *October, 1885*.

978. A soldier having been arrested by the civil authorities of a State for the commission of a civil offence, his post commander applied for counsel to defend him. *Advised* that there was no provision of law for furnishing counsel in such a case. The laws of the State make it the duty of the courts to assign counsel at the request of an accused party when unable to employ any. 42, 51, *July, 1890*; 49, 253, *September, 1891*.

979. Upon a request that counsel be employed by the War Department to defend an Indian under arrest on a criminal charge, before a State court, as an act of justice to "a ward of the nation," it was held that there was no fund under control of the Secretary of War that could be used to pay such counsel, and further that the Secretary of War was without authority in the premises. 29, 154, *January, 1889*.

980. The Commissioners of the Vicksburg Military Park employed a firm of lawyers, subject to the approval of the Secretary of War, "to make abstracts of title for them and advise them what steps may be necessary to perfect the title to the lands which the Government needs for the Park." *Held*, that Sec. 189, Rev. Sts., prohibited the employment in question and that therefore the Secretary of War was without authority to approve the same. Card 6781, *July, 1899*.

981. The War Department has no special regulations covering the matter of the qualifications of attorneys appearing before it. In practice any attorney who has legal authority to represent a client in a particular matter will be heard by the Department in that matter. Card 2931, *February, 1897, to March, 1900*.

#### COUNSEL—TO ASSIST A JUDGE-ADVOCATE.

982. There is no special provision of law for compensating attorneys retained as counsel to assist judge-advocates. Such counsel should not be retained, except in important and complicated cases; and the

<sup>1</sup> See 10 Opins. At. Gen., 478.

<sup>2</sup> See 1057 of 1889; 1068 of 1895; 1072 of 1901.



authority of the Secretary of War for their employment should first be sought and obtained. The claims of such counsel, approved by the judge-advocate, should be presented to the Secretary of War, to be paid, if allowed, out of the contingent fund.<sup>1</sup> V. 446, *December, 1863.*

983. The fact of the selection of a certain officer as the judge-advocate of a military court is evidence that such officer is considered qualified to conduct the prosecution of cases before such court; and the employment of civil counsel to aid him in any case can be authorized only by the Secretary of War, or some proper commander. For a judge-advocate to employ counsel without such authority, or to contract with a counsel to pay him for his services a certain amount fixed between them without the sanction of the proper superior, would be an irregular and unwarrantable proceeding, and no such contract would be binding upon the Government. If paid at all he should be paid only such amount as, upon a review of all his services and inspection of the record itself, shall be deemed reasonable and just. XXII 245, *August, 1866.*

#### COUNSEL FOR THE ACCUSED.

984. An officer or soldier put upon trial before a court martial is not entitled as of right to have counsel present with him to assist him in his defence, but the privilege is one which is almost invariably conceded,<sup>2</sup> and where it is unreasonably refused, such refusal may constitute ground for the disapproval of the proceedings. XXXII, 519, *April, 1872.* A court martial, however, is not required to delay an unreasonable time to enable an accused to provide himself with counsel. XXX, 102, *February, 1870.*

985. While reasonable facilities for procuring such counsel as he may desire should be afforded an accused, his claim must be regarded as subordinate to the interests of the service. Thus where an accused officer applied to the department commander who had convened the court, to authorize a particular officer whom he desired as counsel to

<sup>1</sup>In cases of exceptional difficulty and public importance, civil counsel were formerly not unfrequently retained to assist the judge-advocate, as indicated in the text. Since the creation, however, of the office of Judge-Advocate General of the Army, and of the corps of Judge-Advocates, by the act of July 17, 1862, such instances have been of the rarest occurrence. Under the existing law, indeed counsel could be employed at the public expense for this purpose only through the Department of Justice upon the request or recommendation of the Secretary of War.

<sup>2</sup>See McNaughten, p. 178, Macomb (edition of 1809), p. 94; Winthrop, *Mil. Law and Precedents*, 211.

In the case published in par. 4, S. O. 145, Dept. of the East, 1896, the Department Commander decided, as shown by the record, that "as there is no officer . . . available for detail as counsel, it is believed, considering each of the charges, that the judge-advocate of the court should be able to guard the interests of the accused."

Compare, on this subject, *People v. Danell*, 6 Lansing, 44; *People v. Van Allen*, 55 New York, 31.

act in that capacity, and this officer could not at the time be spared from his regular duties without material prejudice to the public interests, *held* that the commander was justified in denying the application, and further that the validity of the subsequent proceedings and sentence in the case was not affected by such denial. XXXII, 519, *April, 1872*.

986. An accused, prior to arraignment, even if in close arrest, should be allowed to have interviews with such counsel, military or civil, as he may have selected. XII, 441, *June, 1865*; XXI, 141, *December, 1865*. So, his counsel should be permitted to have interviews with any accessible military person whom it may be proposed to use as a material witness, or whose knowledge of facts may be useful to the accused in preparing for trial. XIX, 33, *October, 1865*.

987. A military court has no authority (unalogous to that sometimes exercised by civil courts in criminal cases) to *assign* counsel to an accused unprovided with counsel. So *held* that it has no power whatever to compel an officer to act as counsel for an accused. XIII, 400, *July, 1874*. Nor can such a court excuse one of its members to enable him to act as counsel for an accused. XXXV, 490, *July, 1874*; 57, 417, *January, 1893*.

988. *Held* that G. O. 29 of 1890, providing for the detail by the commander of a post at which a general court-martial is ordered to sit, of a suitable officer of his command to act as counsel for prisoners to be arraigned, if requested by them, was not to be construed as sanctioning the detail or voluntary appearance of a post commander himself in such capacity at his own post. 65, 77, *May, 1894*.

989. Section III, Circular 8, A. G. O., 1894, provides that "no officer directly responsible for the discipline of an organization or organizations under his command—as the commanding officer of a post, band, company, battalion, squadron, or regiment—nor the trial officer of a summary court will be regarded as a 'suitable' officer under the provisions of General Order 29, A. G. O., 1890, for this duty (counsel for defence before general court-martial) at the post where he is stationed." *Held* that the section quoted was intended to declare the officers mentioned therein *not* suitable for the duty of counsel, and that it should not be construed as conferring upon them an exemption from such duty, which they could waive.<sup>1</sup> Card 29, *July, 1894*.

990. By the use of the word counsel in General Order No. 29, A. G. O., 1890, without qualification, it was undoubtedly intended that officers detailed as such should perform for an accused soldier all those duties which usually devolve upon counsel for defendants before civil

<sup>1</sup> See COUNSEL, Court-Martial Manual of 1901, p. 25.

courts of criminal jurisdiction, in so far as such duties are apposite to the procedure of military courts. It would be proper for an officer so detailed to employ all honorable means to acquit him, that is to invoke every defence which the law and facts justify, without regard to his own opinion as to the guilt or innocence of the accused. Military law does not any more than the civil assume to punish all wrong doing, but only such as can be ascertained by the methods of justice which the law and the customs of the service prescribe.<sup>1</sup> 64, 164, *March, 1894*; Card 609, *November, 1894*.

991. An application by an accused officer to be furnished, at the expense of the United States, with civil counsel to defend him on his trial by court martial, *remarked upon* as unprecedented and not to be entertained. Par. 1057, A. R. (968 of 1895; 1072 of 1901), relates to no such a case. 50, 277, *November, 1891*. No authority exists for the payment by the United States of civil counsel employed by an officer or an enlisted man to defend him on his trial by court martial. 32, 165, *May, 1889*; 45, 438, *February, 1891*.

#### COURT MARTIAL—AUTHORITY AND FUNCTION.

992. Courts martial are no part of the Judiciary of the United States, but simply instrumentalities of the Executive power. (Compare § 2038, *post*.) They are creatures of *orders*; the power to convene them, as well as the power to act upon their proceedings, being an attribute of *command*. (See SEVENTY-SECOND ARTICLE; ONE HUNDRED AND FOURTH ARTICLE.) But, though transient and summary, their judgments, when rendered upon subjects within their limited jurisdiction (see COURT MARTIAL—JURISDICTION), are as legal and valid as those of any other tribunals, nor are the same subject to be appealed from, set aside, or reviewed, by the courts of the United States or of any State.<sup>2</sup> V, 656, *December, 1864*; LV, 486-492, *March, 1888*.

<sup>1</sup> See COLNELL, *Court Martial Manual* of 1901, p. 25.

<sup>2</sup> See *Dynes v. Hoover*, 20 How., 79; *Ex parte Vallandigham*, 1 Wall., 243; *Keyes v. U. S.*, 109 U. S., 336; *Wales v. Whitney*, 114 *id.*, 564; *Smith v. Whitney*, 116 *id.*, 167; *Johnson v. Sayre*, 158 *id.*, 109, 118; *Fugitive Slave Law Cases*, 1 Batch. 385; *In re Bagart*, 2 Sawyer, 402, 409; *Moore v. Houston*, 3 S. & R., 197; *Ex parte Dunbar*, 14 Mass., 392; *Brown v. Wadsworth*, 15 Verm., 170; *People v. Van Allen*, 55 N. York, 31; *Pennell v. Reed*, 10 Hun., 222; *Moore v. Bastard*, 4 Taunt., 67, 8 Opus. At. Gen., 415, 425. "No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised, set aside, or punished, civilly or criminally, by a court of common law." *Tyler v. Pomeroy*, 8 Allen, 484. Where a court martial has jurisdiction, "its proceedings cannot be collaterally impeached for any mere error or irregularity committed within the sphere of its authority. Its judgments when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances." *Ex parte Reed*, 10 Ohio, 13. See *Winthrop's Mil. L. & P.*, 35-37 and authorities cited; 3 *Greenleaf Ev.*, 470; *Clode Mil. F.*, 361; *id.*, M. L., 58.

In *Rose ex rel. Carter v. Roberts* (99 Fed. Rep., 948) the court said: "It is not the

993. A court martial should in general be left to determine its own course of procedure, except where the same is defined by law, regulation, or usage. It would be unwarranted by usage to require in orders that a court martial shall adopt a certain procedure in any case or class of cases as to a matter properly within its discretion. Thus a commander could not properly *order* that courts martial convened by him should take testimony in cases in which the accused pleaded guilty, though he might properly recommend their doing so. XXXIV, 138, *February, 1875*.

994. Where the accused pleads guilty and the specification does not fully set forth the particulars of the offence, the court is authorized to call upon or permit the judge-advocate to introduce testimony sufficient to inform itself, as well as the reviewing officer, as to the extent of the criminality involved in the offence and the measure of punishment proper to be imposed.<sup>1</sup> XXXIX, 206, *October, 1877*; Card 5093, *October, 1898*.

995. While a specific punishment may be recommended in orders to be adjudged by courts martial in a certain class of cases, it is not competent to *order* such courts to adopt a particular form of sentence in any case. The duty and discretion of courts martial in the imposition of punishments are prescribed and defined by the Articles of War. XXXI, 354, *May, 1871*.

996. It may be said to be a principle of military law that a court martial is to be left independent as to matters legally or properly within its own discretion. Such a court, however, may not assume authority over a subject belonging to the province of the officer by whom it has been convened. Thus, while it may decline to proceed with the trial of a case manifestly not within its jurisdiction, it cannot properly refuse so to proceed on the ground that it is not empowered adequately to punish the offender upon conviction; or that officers junior to the accused have been placed upon the detail; or that the detail being less than thirteen—a greater number might have been put

office of a writ of *habeas corpus* to perform the functions of a writ of error in reviewing the judgment of a court martial. Courts martial are tribunals created by Congress in pursuance of the power conferred by the Constitution, and have as plenary jurisdiction of offences committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offences. The question of jurisdiction may be reached by such a writ, as it may be when the judgment of any tribunal is attacked; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine, and to render the particular judgment and sentence imposed; but, if this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally, or redressed by *habeas corpus*. These principles have been repeatedly declared by the authorities. *In re Davison* (C. C.), 21 Fed., 618; *Ex parte Reed*, 100 U. S., 13, 25 L. Ed., 538; *In re Coy*, 127 U. S., 731, 8 Sup. Ct., 1263, 32 L. Ed., 274; *Ex parte Yarbrough*, 110 U. S., 651, 4 Sup. Ct., 152, 28 L. Ed., 274; *U. S. v. Prolgen*, 153 U. S., 59, 14 Sup. Ct., 746, 38 L. Ed., 631."

<sup>1</sup>See Court-Mar. Manual of 1901, p. 42, par. 2.



upon the court without injury to the service; or that the accused has not been placed in arrest. A court declining to go on with a trial upon any such ground may be peremptorily ordered by the convening authority to proceed; if it still refuses, the preferable course will ordinarily be to dissolve it in general orders (adding, if deemed desirable, an expression of censure on account of its contumacy), and to convene, for the trial, a court composed entirely of new members. XXI, 177, *January, 1866*; XXV, 378, *May, 1868*; XXVIII, 57, *August, 1868*.

997. A court martial has no authority over the person of an accused except when he is before it for trial. It cannot arrest him, or by its own order cause him to be brought to the place of trial; the compelling of his attendance before the court being a duty of the convening officer or post commander.<sup>1</sup> XXII, 406, *February, 1867*. XXXIX, 44, *December, 1876*. So, a court martial has, as such, no authority to arrest, or to require its judge-advocate or other officer to arrest, a witness suspected of false swearing upon a trial which has been had before it: in such a case its proper course is to report the facts to the convening authority for his action. III, 109, *July, 1863*.

998. Charges are regularly and properly referred to a court martial for trial by the officer who has constituted it (or his superior), and a court martial may in general properly decline to entertain charges otherwise submitted. The validity, however, of the proceedings or sentence of a court martial in any case will not be affected by the circumstance that the charges were in fact irregularly referred to it by a commander inferior to the convening officer and without having been approved by him. XXII, 502, *December, 1866*; XXVI, 167, *November, 1867*.

999. A court martial is not authorized, in its discretion and of its own motion, to reject or strike out a charge or specification formally referred to it for trial by competent authority, nor to direct or permit the judge-advocate to drop or withdraw such a charge or specification, or enter a *nolle prosequi* as to the same. For such action the authority of the convening commander is requisite.<sup>2</sup> But where, by a special plea or objection, an issue is made by the accused as to the sufficiency of any pleading, the court, without referring the question to the convening officer, is empowered to allow the plea or objection and quash or strike out the charge, &c.<sup>3</sup> XXIX, 370, *October, 1869*; 20, 378, *November, 1887*.

<sup>1</sup> See note to § 1000, *post*.

<sup>2</sup> Compare G. C. M. O. 13, Dept. of the Missouri, 1877, do. 30, 79, Dept. of the Platte, 1877; do. 13, *id.*, 1878; do. 41, *id.*, 1880; do. 45, 48, Div. of Pacific and Dept. of Cal., 1880.

<sup>3</sup> This paragraph sets forth the established practice in our service. It is now incorporated in the Court-Martial Manual (1901), p. 49, sec. v. As to the authority of the court to direct an amendment of a charge or specification, see note to § 720, *ante*.



**1000.** When a court martial desires to have the benefit of the testimony of a party who has not been introduced as a witness by the prosecution or defence, it may properly call upon the judge advocate to have such party summoned, or if he is a military person may apply to the convening authority or post commander to have him ordered before it to testify,<sup>1</sup> and it may adjourn the trial for a reasonable time to await his attendance. XXV, 578, *May, 1868*.

**1001.** In the interests of justice and for the purpose of fully informing itself of the facts, the court may, in its discretion, allow the introduction, by either side, of material testimony after the case has been formally closed.<sup>2</sup> Such a proceeding, however, must be of course exceptional, and a party should not be permitted to offer testimony at this stage, unless he exhibits good reason for not having produced it at the usual and proper time. XII, 401, *May, 1865*; XVII, 398, *October, 1865*.

**1002.** In a case where—a plea of guilty having been interposed—the prosecution had closed and the accused had proceeded to present to the court a statement of defence, *held* that the court was authorized, in its discretion, to reopen the case and hear testimony relative to certain gross ill-treatment to which the accused in his statement had represented that he had been subjected, and which he claimed, had excused or extenuated his offence. XXXI, 85, *November, 1870*.

**1003.** A court martial, after having entered upon a trial which has to be suspended on account of the absence of material witnesses, or for other cause, is authorized, in its discretion, to take up a new case not likely to involve an extended investigation, and proceed with it to its termination before resuming the trial of the first case. III, 281, *August, 1863*; IX, 650, *September, 1864*; XXVI, 548, *May, 1868*.

**1004.** A court martial has no power to terminate its own existence or function. Where therefore it has adjourned "*sine die*" (see

<sup>1</sup>It has not been the practice in this country for the convening authority to detail an officer to attend a military court in a ministerial capacity—to summon witnesses, enforce the attendance of the accused, &c. In the special case, indeed, of the persons charged with complicity in the assassination of President Lincoln, and tried by military commission, it was ordered by the President—May 1st, 1865—as follows: "That Brevet Major General Hartranft be assigned to duty as special provost marshal general for the purposes of said trial, and attendance upon said commission, and the execution of its mandates."

<sup>2</sup>Compare *Eberhardt v. State*, 47 Ga., 598; and see the trial, by court-martial, of B. G. Harris (Ex. Doc. No. 14, H. R., 39th Cong., 1st sess., p. 25), where, on the day on which the accused was to present his final argument to the court, and which was two days after the formal closing of the case, the defence was allowed to introduce new testimony on the merits. See also *Court-Martial Manual* (1901), p. 43.

It is moreover the duty of a court martial to see that injustice is not done the accused by the admission on the trial of improper testimony prejudicing his defence, or unfairly tending to aggravate the misconduct charged. In the interests of justice, therefore, the court may exclude such testimony although its admission may not be objected to on the part of the accused. Compare *State v. O'Connor*, 65 Missouri, 374.

§ 395, *ante*), it may, without being formally reconvened in orders, reassemble and take up and try a case referred to it by the convening authority, through its president or judge-advocate, precisely as if it had not adjourned at all. It is its duty indeed to hold itself in readiness to try all cases so referred, until formally dissolved by the convening officer or his successor in the command. XIX, 628, *May, 1866*; XLI, 282, *June, 1878*.

1005. An adjournment "*aine die*" by a court martial does not dissolve it, and the reviewing authority is authorized to send back to the court its record for the reconsideration of the judgment, and the court itself to reconsider and reframe the sentence, subsequently to such an adjournment and without regard to it.<sup>1</sup> LV, 208, *December, 1887*.

1006. A court martial is not legally dissolved till officially informed of an order, from competent authority, dissolving it. The proceedings of a court martial, had after the date of an order dissolving it but before the court has become officially advised of such order, will thus be quite regular and valid. Where an order dissolving forthwith a court martial has been duly officially received by the court and has thus taken effect, an order subsequently received revoking this order will be entirely futile. It will not revive the court, but the same, to be qualified for further action, must be formally re-convened as a new and distinct tribunal. XLIII, 160, *January, 1880*; 32, 29, *April, 1889*.

1007. Except where it sustains a challenge under Art. 88, a court martial is not authorized to dispense with the attendance of a member.<sup>2</sup> XXXVII, 34, *September, 1875*. It cannot excuse a member to enable him to attend to other duties; for example, to act as counsel for the accused. For such purpose he must be duly *relieved* by the convening authority. XXI, 650, *September, 1866*; XXXV, 488, 490, *July, 1874*. Where a court martial relieved two of its members on the ground that, having been absent from a portion of the proceedings, they had not heard a portion of the testimony,<sup>3</sup> *held* that, provided *five* members had always remained and been present, the validity of the findings and sentence was not affected, and the same would properly be approved, unless it appeared that the action of the court had in some manner prejudiced the defence. 15, 48, *February, 1887*.

1008. Where a court martial excused its judge-advocate, and required its junior member to act as judge-advocate in his stead, *held* that its action was wholly unauthorized and that its proceedings were properly disapproved.<sup>4</sup> It is only the convening authority (or his suc-

<sup>1</sup> See *Brown v. Root*, Sup. Court, D. C., 1900 (44,087 Law).

<sup>2</sup> Compare 7 Opins. At. Gen. 98.

<sup>3</sup> See note to § 1667, *post*.

<sup>4</sup> See G. C. M. O. 62, War Dept., 1874.

cessor in command) who can relieve or detail a member or a judge-advocate. XXVIII, 198, *October, 1868*.

1009. Strictly, communications from the convening authority to the court *as such* (and *vice versa*) should be made to (and by) the president as its organ, unless in the latter case the court directs the judge-advocate to represent it; communications relating to the conduct of the prosecution should be made to (and by) the judge-advocate. XXIX, 336, *October, 1869*.

1010. There is no law prohibiting a court martial of the United States from sitting on Sunday, and the fact that a sentence of such a court is adjudged on that day can affect in no manner its validity in law. XXXIX, 321, 627, *November, 1877*, and *August, 1878*; Card 2955, *February, 1897*.

1011. The *polling* of a court martial, in the manner of a jury or otherwise, is a proceeding wholly unknown to military law. So, where an officer, acting as the counsel of a soldier on trial by court martial, demanded, on the court ruling adversely upon the admission of a special plea, that it be polled,—*held* that his action was wholly irregular as well as disrespectful to the court.<sup>1</sup> XXXIV, 454, *September, 1873*.

1012. A court martial is authorized, in its discretion, to sit with doors closed to the public. Except, however, when temporarily closed for deliberation, courts martial in this country are almost invariably open to the public during a trial. XXIX, 34, *June, 1869*. But in a particular case where the offences charged were of a scandalous nature, it was recommended that the court be directed to sit with doors closed to the public. Card 1637, *August, 1895*.

1013. A court martial is authorized to exclude from its session any person who, it has good reason to believe, will endeavor to intimidate or interrupt the witnesses, or otherwise conduct himself in a disorderly manner. XXIX, 237, *August, 1869*.

1014. Where, after the accused has pleaded guilty, or after he has pleaded not guilty and the evidence for the prosecution has been presented, he effects an escape from military custody and disappears, he may properly be held to have waived his right of defence, and the court is authorized to proceed with the trial to a finding and, in the event of conviction, a sentence.<sup>2</sup> XI, 260, 295, *December, 1864*; XXI, 169, *January, 1866*. Where, in such a case, the accused leaves counsel, the court may, in its discretion, allow such counsel to introduce evidence and present an argument. XIX, 487, *March, 1866*.

1015. The remarking by the court, in connection with the finding

<sup>1</sup>See G. C. M. O. 37, War Dept., 1873.

<sup>2</sup>See *Fight v. The State*, 7 Ohio, 180; *McCorkle v. The State*, 14 Ind., p. 39; *State v. Wamire*, 16 Ind., 357. See also *Court-Martial Manual* (1901), par. 7, p. 15.

or sentence, unfavorably upon an officer or soldier (other than the accused) whose conduct is exhibited by the testimony, or upon an act or practice deemed proper to be noted in the interests of military discipline, though now comparatively unusual, is sanctioned by the authorities as permissible and regular in a proper case.<sup>1</sup> XXVIII, 626, *May, 1869*; XXIX, 216, *August, 1869*.

1016. A court-martial may, in connection with its judgment, properly animadvert upon a witness, not only as testifying falsely but as giving evasive and disingenuous testimony; but the power to thus animadvert upon witnesses should be exercised with caution. 42, 156, *July, 1890*.

1017. To detail as a military commission the same officers as those already constituting a court-martial or *vice versa*, without dissolving the court first convened, though a proceeding for which there are precedents both in the Mexican war and the war of the rebellion, is one which should not be resorted to where, without material embarrassment to the service, it can be avoided. And this view is applicable, though with less force, to the case of a single officer proposed to be detailed upon two distinct military courts at the same time: such a detail should not be made unless, on account of the scarcity of officers available for such duty, it cannot well be avoided. VII, 134, *February, 1864*; XIX, 495, *March, 1866*.

1018. A court-martial has only statutory powers. Its judicial authority being derived wholly from statute (mostly the Articles of War), it can exercise no common law functions, such, for example, as the general power to punish for contempt. XLIX, 306, *August, 1887*. Its origin and authority being statutory, the statute law investing it with its powers must be closely followed. No presumption can be made in favor of its jurisdiction. LV, 486, *March, 1888*.

1019. Courts-martial being no part of the Judiciary of the United States, but simply instrumentalities of the Executive power, the provisions of Art. VI of the Amendments to the Constitution, according, in criminal prosecutions, the right of trial by jury and to be confronted with the witnesses, do not apply to their procedure which is governed wholly by statute and military usage. *Held* therefore that the use of depositions under the provisions of the 91st Article of war was not open to objection on constitutional grounds. 52, 204, *February, 1892*; 55, 492, *October, 1892*.

1020. The principle of the Vth Amendment to the Constitution, but

<sup>1</sup> See Simmons §§ 600-707; Kennedy, 196-7; De Hart, 182-3; O'Brien, 268. In *Jekyll v. Moore*, 2 Bos. & Pul. 341, the expression of opinion by a court-martial, in acquitting an accused, that the prosecution had been actuated by malice, was held not to constitute a libel.



not the amendment itself, applies to courts martial trials as a part of our common law military. As Sec. 860, Rev. Sts., does not apply to courts-martial, it does not set aside the general principle which with courts-martial takes the place of the constitutional provision, but whether it applies or not, an accused on trial before a court-martial cannot, when testifying as a witness in his own behalf, be compelled by it to criminate himself as to the matter at issue. *Curd* 1495, *July, 1895*.

**1021.** A court martial convened by the Secretary of War, *held* legally constituted; such act of the Secretary being administrative and in law the act of the President whom he represents.<sup>1</sup> The order here is not a judicial but an executive act, and, like any other executive order, is legal if made through the head of the executive department to the province of which it pertains. *LVI*, 465, *August, 1888*; **64**, 162, *March, 1894*.

**1022.** The officers of the branches of the service specified in par. 190, A. R. (do. of 1895; 208 of 1901), are subject to be detailed upon court martial duty only by orders emanating from the War Department. An officer of the Subsistence Department, assigned to duty at a general "dépôt of supply," was ordered to "report, on his arrival, by letter to the department commander." *Held* that this was not an order to report for duty and did not except him from the application of the regulation or place him, for court martial service or otherwise, under the command of such commander, but enjoined merely a formal announcement of his arrival and entering upon his duties properly called for by considerations of courtesy and deference towards his military superior. **48**, 255, *July, 1891*.

**1023.** A court martial cannot be availed of for the collection of the private debts of officers; it can take no notice of their financial obligations except as evidence of fraud or dishonor when admissible in proof of an offence under the Articles of War. **35**, 463, *October, 1889*.

#### COURT MARTIAL JURISDICTION.

**1024.** Courts martial (though, within their scope and province, authoritative and independent tribunals—see § 1022, *ante*) are bodies of exceptional and restricted powers and jurisdiction; their cognizance being confined to the distinctive classes of offences recognized by the military code.<sup>2</sup> Their jurisdiction is *criminal*, their function being to

<sup>1</sup> See § 2204, *post*.

<sup>2</sup> *Ex parte* Watkins, 3 Pet., 193, 209; *Barrett v. Crane*, 16 Verm., 246; *Brooks v. Adams*, 11 Pick., 440; *Brooks v. Davis*, 17 *id.*, 148; *Brooks v. Daniels*, 22 *id.*, 198; *Washburn v. Phillips*, 2 Met., 206; *Smith v. Shaw*, 12 Johns., 257; *Mills v. Martin*, 14 *id.*, 7. In *matter of Wright* 34 How. Pr. 221; *Dunfield v. Smith* 3 Sergt. & Rawle 590; *Bell v. Tooley*, 12 Instell. 605; *State v. Stevens*, 2 McCord. 32; *Miller v. Sears*, 2 W.



award (in proper cases) *punishment*: they have no authority to adjudge damages for personal injuries or private wrongs.<sup>1</sup> XXVII, 454, *January, 1869*. They have no power to rescind a contract or to pass upon other civil rights. They are called into existence solely for the purpose of awarding punishment for military offences. Card 3608, *November, 1897*.

**1025.** While it will in general be more for the interest and convenience of the service to bring an accused officer or soldier to trial near the locality of his offence, he may with equal legality be tried by a court convened in any other part of the United States.<sup>2</sup> XI, 351, *December, 1864*.

**1026.** In order to become amenable to the military jurisdiction, an officer or soldier must have been legally and fully admitted into the military service of the United States. Thus *held* that an officer of State volunteers appointed by a governor of a State, but not yet mustered into the United States service, was not amenable to the jurisdiction of a court martial of the United States for an offence committed while engaged in recruiting service under the authority of the governor. XII, 475, *July, 1865*.

**1027.** An officer or soldier (except as otherwise provided in the 60th Article) ceases to be amenable to the military jurisdiction, for offences committed while in the military service, after he has been separated therefrom by resignation, dismissal, being dropped for desertion, muster out, discharge, &c., and has thus become a civilian.<sup>3</sup> The old English precedent of Sackville's case<sup>4</sup> (which appears indeed to stand alone even in England) has not been followed in this country or recognized in our law. I, 395, *November, 1862*; II, 49, *March, 1863*; XII, 476, *July, 1865*; XIII, 108, *December, 1864*; XIX, 64, 71, *October, 1865*; XXI, 37, *November, 1865*; XXXI, 34, 48, *November, 1870*; 571, *August, 1871*; XXXIII, 354, *September, 1872*; XXXIV, 422, *August, 1874*; XXXV, 649, *November, 1874*; XLII, 313, *June, 1879*.

Black., 1141; 6 Opus. At. Gen., 425. "A court martial is a court of limited and special jurisdiction. It is called into existence by force of express statute law, for a special purpose, and to perform a particular duty; and when the object of its creation is accomplished, it ceases to exist. \* \* \* If, in its proceedings or sentence, it transgresses the limit of its jurisdiction, the members of the court, and the officer who executes its sentence, are trespassers, and as such are answerable to the party injured, in damages, in the courts." 3 Greenl. Ev., § 470. See also McNaghten, pp. 175, 176.

<sup>1</sup>See 2 Greenl. Ev., §§ 471, 476. *United States v. Clark*, 6 Otto, 40; *Warden v. Bailey*, 4 Taunt., 78.

<sup>2</sup>That the jurisdiction of courts-martial is non-territorial, see § 1041, *post*.

<sup>3</sup>See this principle repeated and illustrated in *G. C. M. O.* 4, 16, War Dept., 1871; *G. O.* 90, Dec. of Pennsylvania, 1865, do 43, Middle Dept., 1865, do 22, Dept. of the Missouri, 1866.

<sup>4</sup>Note the counter *dictum* of Lord Mansfield, in *Parker v. Clive*, 4 Burrow, 2419 (dated in 1779), that officers of the army, "after resigning their commissions, cease to be objects of military jurisdiction."

A discharge of a soldier, when subject to trial and punishment for a military offence, is a formal waiver and abandonment by the United States of jurisdiction over him. XXXIV, 406, *August, 1873*. Nor does a soldier, after having been dishonorably discharged by sentence, remain liable to the military jurisdiction, for desertion or any other military offence committed *before* discharge, by reason of being still held in military custody as a prisoner in confinement under the same sentence; for he is then held not as a soldier but as a civilian convict. XXXI, 34, *November, 1870*; XXXII, 190, *December, 1871*; XXXIII, 354, *September, 1872*; XLI, 225, *May, 1878*; Card 7614, *January, 1900*.

Nor can a person, who, by reason of acceptance of resignation, dismissal, discharge, &c., has become wholly detached from the military service, be made liable to trial by court martial, for offences committed while in the service, on the ground that such offences were not discovered till after he had left the army. XXXVII, 374, *March, 1876*.

The returning by a dismissed, &c., officer to the service under a new commission does not revive a jurisdiction, for offences committed while he was in the service, which had lapsed upon his being separated from it.<sup>1</sup> V, 314, *November, 1863*; XXXV, 649, *November, 1874*.

Except as to the offences covered by the 60th Article of War, amenability to military jurisdiction ceases on dismissal or other severance from the military service, the United States being deemed to have waived the right of prosecution; nor is such amenability for offences committed during a period of service which has been legally terminated, revived by a subsequent re-entry into service. L, 634, *August, 1886*.

1028. An honorable discharge releases from and marks the termination of the particular contract and term of enlistment to which it relates only; and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment. 49, 442, *October, 1891*; 53, 179, *April, 1892*; 59, 86, *April, 1893*. Similarly *held* with respect to a discharge without honor. Card 2415, *March, 1896*. These discharges release the soldier from amenability for all offences charged against him within the particular term to which they relate, including that of desertion, except as provided in the 60th Article of War. Card 2041, *May, 1896*. But a dishonorable discharge (*i. e.*, by sentence) does not relate to any particular contract or term of enlistment; it is a discharge from the military service as a

<sup>1</sup> It is to be understood that the general rule of the nonamenability to military trial of officers and soldiers, after discharge, dismissal, &c., for offences committed prior thereto, is subject to a specific statutory exception, *viz.* that provided for in the concluding provision of the 60th Article. As to the question of the constitutionality of this provision, see § 117, *ante*, and note; also note to § 1031, *post*.

punishment—a complete expulsion from the army—and covers all unexpired enlistments. A soldier thus dishonorably discharged *cannot* be made amenable for a desertion or other military offence committed under a prior enlistment, except as provided in the 60th Article of War. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offences. **53**, 179, *supra*; **55**, 165, *August, 1892*; **59**, 55, *April, 1893*; Card 7614, *January, 1900*.

**1029.** A soldier, however, provided he has not been in fact discharged, may be brought to trial by court martial after the term of service for which he enlisted has expired, provided, before such expiration, proceedings with a view to trial have been duly commenced against him by arrest or service of formal charges.<sup>1</sup> By such arrest or service the military jurisdiction attaches, and, once attached, trial by court martial, and punishment, upon conviction, may legally ensue, though the soldier's term of enlistment may in fact expire before the trial be entered upon. In the leading case on this point of a seaman in the navy (*In re Walker*, 3 American Jurist, 281), the Supreme Court of Massachusetts held<sup>2</sup> (January 25, 1839) as follows: "In this case the petitioner was arrested, or put in confinement, and charges were preferred against him to the Secretary of the Navy before the expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court martial to proceed to trial and sentence, notwithstanding the time of service had expired before the court martial had been convened." So *held*, in a case of a soldier of the regular army, arrested on the day before the expiration of his term of enlistment, with a view to a trial for a military offence by court martial, that the jurisdiction of the court had duly attached, and that his trial might legally be proceeded with. **XXVI**, 512, *April, 1868*. And similarly *held* in repeated cases of soldiers and officers of regular and volunteer regiments. **V**, 313, *November, 1861*; **VII**, 24, *July, 1864*; **XII**, 352, *February, 1865*; **XIV**, 229, *March, 1865*; **XVI**, 562, *September, 1865*; **XXVII**, 599, *April, 1869*; Card 2011, *January, 1896*.

**1030.** Persons in the military service are amenable to the jurisdiction of courts martial for military offences committed by them while in arrest or confinement awaiting trial by court martial. **33**, 335, *June, 1889*.

**1031.** By the VIth Amendment of the Constitution, civilians are guaranteed the right of trial by jury "in all criminal prosecutions."

<sup>1</sup> See G. C. M. O. 16, War Dept., 1871.

<sup>2</sup> And see Judge Story's charge to the jury in *United States v. Travers*, 2 Wheeler Cr. C. 490, 509; *In the matter of Dew*, 25 L. R. 540; *In re Bird*, 2 Sawyer, 33.

Thus in time of peace a court martial cannot assume jurisdiction of an offence committed by a civilian without a violation of the Constitution. It is only under the exceptional circumstances of a time of war that civilians may, in certain situations, become amenable to trial by court martial. XIX, 475, *March, 1866*; XXXVIII, 641, *June, 1867*.

1032. Any statute by which any class of civilians is attempted to be made amenable to trial by court martial for offences committed while civilians and in time of peace, is necessarily unconstitutional. XLII, 250, *April, 1879*.

1033. Sec. 1361, Rev. Sts., applies only to prisoners in confinement at the military prison at Leavenworth. So, in a case of a prisoner, who, while confined, after discharge under sentence, at the prison at Alcatraz Island, was brought to trial by court martial for an escape and sentenced, on conviction, to an additional term of imprisonment, *held* that the second trial—the prisoner being then a civilian—was wholly without legal authority and the sentence of no effect. XXXI, 47, *November, 1879*; XXXVII, 541, *May, 1876*.

1034. So, where a prisoner confined at the *Leavenworth* prison after a discharge from the service, was brought to trial by court martial for an offence (desertion) committed not during his confinement but more than a year and a half before he was received at the prison under his original sentence, *held* that Sec. 1361, Rev. Sts., furnished no authority for such trial, and that the court was therefore without jurisdiction and the sentence void. XLI, 228, *May, 1878*.

1035. To give a court martial jurisdiction of the person of an officer or soldier charged with a military offence, it is not necessary that he shall have been subjected to any particular form of arrest, or that he shall have been arrested at all, or even ordered to attend the court. Here, as before a civil tribunal, his voluntary appearance and submission for trial is sufficient to give the court jurisdiction of his person. XXVIII, 27, *July, 1868*.

1036. It is no objection to the assuming by a court martial of jurisdiction of a military offence committed by an officer or soldier, that he may be amenable to trial, or may actually have been tried and con-

<sup>1</sup>See, in support of this view, *Ex parte* Milligan, 4 Wallace, 121-123; Jones v. Seward, 40 Barb., 561. In matter of Martin, 45 *id.*, 145. Smith v. Shaw, 12 Johns., 267, 268; In matter of Stacy, 10 *id.*, 332. Mills v. Martin, 19 *id.*, 22. Johnson v. Jones, 44 Ills., 142, 155; Griffin v. Wilcox, 21 Ind., 386; *In re* Kemp, 16 Wis., 382; *Ex parte* McRoberts, 16 Iowa, 605; Antrim's case, 5 Philad., 288; 3 Opins At. Gen., 690; 13 *id.*, 63.

A civilian brought to trial before a court-martial, cannot, by a plea of guilty or other form of legal assent, confer jurisdiction upon the court where no jurisdiction exists in law. Compare *People v. Campbell*, 4 Parker, 386; *Shoemaker v. Nesbit*, 2 Rawle, 261; *Moore v. Houston*, 3 Sergt. & Rawle, 190; *Duffield v. Smith*, *id.*, 539.

<sup>2</sup>This view is approved, and the last sentence of the prisoner declared inoperative by the Secretary of War, in G. C. M. O. 4, War Dept., 1871. But see now sec. 5 of the Summary Court Act approved June 18, 1898.



victed, by a criminal court of the State, &c., for a criminal offence involved in his act. Thus a soldier may be tried for a violation of Art. 21, in striking or doing other violence to a superior officer, after having been convicted by a civil tribunal for the criminal assault and battery. So, an officer or soldier may be brought to trial under a charge of "Conduct to the prejudice of good order and military discipline" for the military offence (if any) involved—see SIXTY-SECOND ARTICLE—in a homicide or a larceny, of which, as a civil offence, he has been acquitted or convicted by a criminal court.<sup>1</sup> And the reverse is also law, *viz.*, that the civil court may legally take cognizance of the criminal offence involved, without regard to the fact that the party has been subjected to a trial and conviction by court-martial for his breach of military law or discipline. In such instances the act committed is an offence against the two jurisdictions and may legally subject the offender to be tried and punished under both.<sup>2</sup> V, 140, *October, 1863*; XLI, 187, *April, 1878*; XLIII, 210, *February, 1880*; XLIX, 657, *January, 1886*; 65, 268-9, *June, 1894*; Card 6862, *August, 1899*.

1037. It cannot affect the authority of a court martial to take cognizance of the military offence involved in an injury committed by a soldier against an officer, that, before the trial, the latter has resigned or been otherwise separated from the army. XXXII, 623, *May, 1872*.

1038. In March, 1870, the president of the "National Home for Disabled Volunteer Soldiers" (a civilian) convened, at the home, a court martial composed of eight inmates of the same (all civilians, but designated by their former rank in the volunteer service, as "surgeon," "captain," "sergeant," and "private") for the trial, on charges of desertion and other offences, of another (civilian) inmate. The court tried the accused, convicted him, and sentenced him to a term of imprisonment. The proceedings and sentence were approved

<sup>1</sup> As to the *measure of the punishment*, upon the conviction of the military offence, see § 2418, *post*.

<sup>2</sup> That an officer may be amenable to the civil and the military jurisdiction at the same time for the same act, see cases of Ast. Surgeon Steiner and Captain Howe, 6 Opins. At. Gen., 413, 506. In the former case it is held that the "conviction or acquittal of an officer by the civil authorities, of the offence against the general law, does not discharge him from responsibility for the military offence involved in the same facts." In the latter case it is observed: "An officer may be tried by court martial for the military relation of an act, after having been tried by the civil authorities for the civil relations of the same act." And see 30 Opins. At. Gen., 749, and compare Moore v. Illinois, 14 Howard, 19-20. In a case published in G. C. M. O. 20, Hdqrs. of Army, 1866, an officer was charged with and convicted of "Conduct to the prejudice of good order and military discipline," for the killing of a soldier, for which, as "manslaughter," he had previously been acquitted by a civil court. And see cases in G. O. 78, Dept. of the East, 1869; G. C. M. O. 50, Dept. of the Missouri, 1871. See Court Martial Manual, 1901, par. 7, p. 17.

In cases of double amenability, while—in view of the subordination of the military to the civil power—the civil jurisdiction is entitled to the preference, yet, in general, that jurisdiction which is *most fully attached* is ordinarily properly allowed to have the precedence in its exercise over the other. See *Ex parte McRoberts*, 16 Iowa, 606; 6 Opins. At. Gen., 423; G. O. 25, Hdqrs. of Army, 1840.



by the convening authority, who thereupon applied to the Secretary of War for an order designating a military prison for the confinement of the party in execution of his sentence. *Held* (upon a reference of the case for opinion, by the Secretary of War), that the proceedings were unprecedented, unauthorized *ab initio*, and void as a whole and in detail; that the provision in the act establishing the home, that the inmates should be "subject to the rules and articles of war in the same manner as if they were in the army," even if it could be regarded as constitutional, conveyed no authority for such a court as that constituted and composed in this case; and that the sentence adjudged by the same could not legally be executed in the manner proposed or otherwise.<sup>1</sup> XXX, 286, *April, 1870*.

1039. The discharge of a soldier not taking effect until notice thereof,<sup>2</sup> actual or constructive, *held* that a soldier who committed a military offence on the day on which he was to be dishonorably discharged under sentence but before the discharge was delivered to him (or to the officer in charge of the prison at which he was also to be confined under the same sentence) was amenable to the military jurisdiction for the trial and punishment of such offence as being still in the military service. 27, 383, *October, 1888*.

1040. *Held* that an officer could not, by procuring himself to be, or consenting to being, placed under a "conservator" as a habitual drunkard, in the form prescribed by the local law, withdraw himself from the military jurisdiction; but that he remained amenable to trial and punishment for offences committed prior to such proceeding and within the period of limitation. *So recommended* in the particular case that the officer be brought to trial for certain offences (duplication of pay accounts) committed prior to such proceeding. 63, 358, *February, 1894*.

1041. The jurisdiction of courts martial is non-territorial. In a case of an officer who exhibited himself in a drunken condition at a public ball in Mexico, *held* that his offence was cognizable by a court martial of the United States, subsequently convened in Texas by the department commander. This for the reason that the military jurisdiction does not recognize territoriality as an essential element of military offences but extends to the same wherever committed; a principle which is amply confirmed by the comprehensive provision of the 64th Article of War.<sup>3</sup> 48, 52, *January, 1891*; 64, 64, *February, 1894*.

<sup>1</sup> It is inaccurately stated in the report of the case of *Renner v. Bennett*, 21 Ohio St. 434 (December, 1871) that no inmate of the National Home had ever been subjected to a trial by court martial. The instance referred to in the text, however, is the only one known of such a trial, and in this case the proceedings were on the report of the Judge-Advocate-General, declared to be void *ab initio* and wholly inoperative by the Secretary of War.

<sup>2</sup> See § 1153, *post*.

<sup>3</sup> See G. C. M. O. 11, Dept. Texas, 1894.

## D.

## DEED.

**1042.** An act of Congress authorized the Secretary of War simply to "*cede*" to a city certain piers. *Held* that the term "*cede*" called for a simple absolute grant, and that a deed of bargain and sale for a valuable consideration was not the correct form of transfer; further, that as the authority was in terms to *cede*, without more, the Secretary would not be empowered to attach to the grant any covenants or conditions as to the use or care of the piers or otherwise. Should the city hereafter permit its piers to become an obstruction to navigation, there is a remedy provided by law. LIII, 381, *April, 1887*.

**1043.** Certain lands were granted to the United States for canal purposes, and it was expressly stipulated in the deed that the same should be "occupied, used and employed in and for no other use or object whatever." A revocable license was granted by the Secretary of War to a bridge company to enter upon and lay a temporary railway over a part of such lands. *Held* that this was a mere permission for a transient use not inconsistent with the grant; and that, whether the stipulation in the deed was construed to be a mere covenant or a condition subsequent, there was here no such diversion of the premises from the purposes for which they were granted as to work a forfeiture.<sup>1</sup> LV, 37, *September, 1886*.

**1044.** No formal acceptance of a deed, apart from the delivery, is necessary, and in the practice of the War Department a formal acceptance is not usually given. An acceptance may be presumed from a variety of circumstances, such as placing the deed on record, possession of the deed, the conveyance being beneficial to the grantee, the exercising of ownership over the property conveyed, &c. Thus where the Secretary of War secured in 1871, under sec. 18 of the act of July 17, 1862, a deed to a certain piece of land for use as a cemetery, which deed was duly delivered, placed on record, and forwarded to the War Department, and the land was so used until 1880, at which time the Secretary of War declined to accept the said deed of 1871, it was held that the deed had long since been legally accepted, vesting the title in the United States, that the subsequent refusal to accept it, did not divest the title, and that, in the absence of authority from Congress,

<sup>1</sup> See 2 Washburn on Real Property, 6; McKelway v. Seymour, 29 N. J. Law, 231; Chapin v. School Dist., 35 N. H., 452; Thornton v. Trammell, 39 Cal., 202.

the Secretary of War could not convey it to other parties. Card 3790, *January, 1898*.

1045. The owner of a certain tract of land subject to overflow from the government reservoir system at the headwaters of the Mississippi river, conveyed to the United States by a deed, duly executed, acknowledged and recorded, the perpetual right to overflow the said tract for a nominal consideration. Subsequently he asked that the deed be cancelled and another and larger consideration be paid him for the easement. *Held* that the Secretary of War had no authority to cancel the deed, or to release the easement conveyed by it. Card 3782, *January, 1898*.

1046. An act of Congress authorized and directed the Secretary of War to sell a certain parcel of land at public auction and to convey the same to the purchaser. The act also prescribed in detail the manner of advertising, &c. *Held* that the deed should preferably contain recitals showing that the provisions of the act of Congress under which it was given were complied with. Card 631, *November, 1894*.

#### DEFENCE.

1047. In order that he may not be embarrassed in making his defence, the accused party on trial before a court martial should be subjected to no restraint other than such as may be necessary to enforce his presence or prevent disorderly conduct on his part. Except, therefore, in an extreme case, as where, the accused being charged with an aggravated and heinous offence, there is reasonable ground to believe that he will attempt to escape or to commit acts of violence, the keeping or placing of irons upon him while before the court will not be justified.<sup>1</sup> Even in such a case it will be preferable to place an adequate guard over him. XXXI, 102, *December, 1870*; XXXII, 274, 633, *January and May, 1872*.

1048. It is the right of the accused, and may be most important to his defence, that he be allowed to be present during all the material proceedings of the trial. He cannot therefore be then legally excluded from the court room. He may however waive the right to be present, and if he thus voluntarily absents himself, the validity of the proceedings is not affected. XXIV, 488, *April, 1867*.

1049. The fact that the accused is an officer of high rank should not be regarded as constituting a ground for allowing him any special right or privilege in his defence before a court martial. The administration of justice by a military, as by a civil court, must be strictly

<sup>1</sup> Compare *G. C. M. O.* 62, Dept. of the Missouri, 1877, do. 55, *id.*, 1879, and—as to the civil practice—*Lee v. State*, 51 Miss., 596; *People v. Harrington*, 42 Cal., 175.

impartial, or it ceases to be pure. All persons on trial by the one species of tribunal, as by the other, are deemed to be equal before the law. XI, 204, *December, 1864*.

1050. It is no sufficient defence to a charge of striking or using other violence against a soldier, by an officer, that the soldier was himself violent and insubordinate, unless it most clearly appear that the force employed by the officer was resorted to in self defence, or that the soldier could not have been repressed or restrained by the usual and legitimate methods and instrumentalities of discipline. LIII, 193, *October, 1886*; 43, 52, *September, 1890*; 60, 257, *June, 1893*.

1051. An officer having had a verbal altercation with another officer (of superior rank) in which the latter had (as he, the former, represented) used invidious language toward him and threatened his life, addressed to the latter, on the following day, a highly abusive and insulting communication in writing. On his being brought to trial for this offence, the court-martial sentenced him only to be reprimanded on account, as they expressed it, of the "great provocation" received by him. *Held* that the proper redress of the accused in such a case was by complaint to the proper superior and the preferring of charges; that the course taken by him was unmilitary and unbecoming, the language used by the other, however reprehensible, constituting no legal provocation and no defence to his act as charged. 65, 285, *June, 1894*.

#### DEPOSITS.

1052. *Held*, under Section 1306, Rev. Sts., that a soldier, having savings on deposit as authorized by Sec. 1305, Rev. Sts., was not entitled to interest on the same after the date of his dishonorable discharge under a sentence imposing the same; although the discharge certificate, by reason of the soldier being subjected to a term of confinement adjudged by the same sentence, was not delivered personally to the soldier but to the commanding officer to retain in trust for him pending his confinement. L, 494, *July, 1886*.

#### DESERTION.

1053. Desertion is an unauthorized absenting of himself from the military service, by an officer or soldier, with the intention of not returning. In other words, it is the violation of military discipline familiarly known as absence without leave (whether consisting in an original absenting without authority, or in an overstaying of a defined leave of absence) accompanied by an *animus manendi*, or *non revertemdi*; this *animus* constituting the gist of the offence. In order to



establish the commission of the specific offence, both these elements—the *fact* of the unauthorized voluntary withdrawal, and the *intent* permanently to abandon the service—must be proved. The intent may be inferred, not indeed from the fact of absenting alone, but from the circumstances attending this fact, and here the duration of the absence is especially material. Thus the circumstance that the absence has been exceptionally protracted and quite unexplained will in general furnish a presumption of the existence of the necessary intent. An unauthorized absence, however, of a few hours, terminated by a forcible apprehension, may, under certain situations, be sufficient evidence of such intent and thus proof of a desertion; while an absence for a considerable interval, unattended by circumstances indicating a purpose to separate permanently from the service, or to dissolve the pending engagement of the soldier, may be proof simply of the minor included offence. In order to determine whether or not the officer or soldier absented himself with the intent not to return, *i. e.* whether his offence was desertion or absence without leave, all the circumstances connected with his leaving, absence and return (whether compulsory or voluntary), must be considered together. Each case must be governed by its own peculiar facts, and no general rule on the subject can be laid down. VIII, 109, *March, 1864*; XXVI, 346, *July, 1868*; XXXIII, 123, *July, 1872*.

1054. Where an officer left his post on a three days' leave of absence and did not return to duty or report himself at the proper time, but absconded to Canada with a large amount of government funds, *held*, on his being arrested some months subsequently in the United States, that he was clearly chargeable with the offence of desertion.<sup>1</sup> III, 230, *July, 1863*. So where an officer having been guilty of sundry embezzlements and frauds, and become involved in debt, and being on the point of being placed in arrest, obtained, by means of wholly false representations, a brief leave of absence from his post for the expressed purpose of visiting a certain place named; and was subsequently apprehended at a place quite other and much more distant than that designated, and while rapidly traveling *en route* for a still more remote locality; *held*, in the absence of any evidence to rebut the presumption thus raised, that he was properly chargeable with having absented himself with the *animus* of a deserter. XXXVIII, 622, *June, 1877*.

1055. In trials of desertion it is not necessary to introduce evidence as to the date of enlistment unless the same is alleged in the specification. Card 2844, *January, 1897*.

1056. That a soldier has been *charged* with a desertion is no evidence

<sup>1</sup> See G. O. 332, War Dept., 1863.



that he has committed the offence. II, 520, *June*, 1863. So *held* that a mere entry on a morning report book, descriptive roll, or other official statement or return, that a soldier deserted on a certain day, was not legal evidence of a desertion by him, but was evidence only that he had been *charged* with desertion.<sup>1</sup> XXII, 15, *March*, 1866. So, a report from the Adjutant General's Office containing extracts from the muster-rolls of a regiment on which a soldier of the same was noted as having deserted on a certain date, *held* insufficient proof of the fact of desertion, upon a trial of the soldier for that offence.<sup>2</sup> XII, 28, *October*, 1864. *Held* also that an entry upon a report of prisoners that an accused deserted on a certain day and was subsequently apprehended as a deserter was not legal evidence of the fact of desertion, upon his trial for that offence. XXXVII, 590, *June*, 1876. Similarly *held* that the mere statement of a first sergeant, given as testimony on the trial of a soldier of his company charged with desertion, that the accused "deserted" at a certain time and place, was insufficient as proof of the offence charged, being indeed but an assertion of a conclusion of law. In such cases it is for the witness simply to state the facts and circumstances, so far as known to him, attending the act charged; it being the province of the court alone to arrive at the conclusion that the offence has been committed. XXXVIII, 640, *June*, 1877. The fact that a soldier has been dropped from the rolls as a deserter is not legal evidence to prove the fact of desertion on a trial for that offence. XLIX, 118, *June*, 1885.

1057. The nature of the offence of desertion is well illustrated in cases of *escape*. The mere fact that a soldier, while awaiting trial or sentence, or while under sentence (and not discharged from the service) escapes from his confinement, is not *proof* of a desertion on his part, since he may have had in view some minor object, such as the procuring of liquor, &c.<sup>3</sup> But an escape, followed by a considerable absence, especially if the soldier is obliged to be forcibly apprehended, is strong presumptive evidence of the existence of the intent necessary to constitute the crime. So, though the absence involved may be comparatively brief, the circumstances accompanying the escape or attending the apprehension, may be such as to justify an equally strong

<sup>1</sup> Compare *tr. C. M. O.* 33, Dept. of the Missouri, 1875.

<sup>2</sup> Compare *Hanson v. S. Scituate*, 115 Mass., 336.

<sup>3</sup> See a case of this nature (an escaping in order to obtain liquor) in *tr. O.* 32, Dept. of the South, 1873, and compare the case in do. 87, *id.*, 1872, in which a conviction of desertion is disapproved on the ground that the evidence showed "merely an escape from the guard house without intention to leave the service or the vicinity of the post." And see in this connection *Samuel*, 324, where to be "discovered,"<sup>6</sup> after a short absence, "in the pursuit of some accidental temporary object, though perhaps otherwise illicit," is instanced as not indicating an intent by the offender "to sever himself from the service."

presumption. An escape, with intent not only to evade confinement but to quit the service, while the party is held awaiting proceedings for desertion, is of course a second or additional desertion.

As to the *nature* of the offence which may be involved, there is properly no substantial distinction between an escape while awaiting trial or sentence and an escape while in confinement under sentence. An escape indeed from an imprisonment imposed by sentence would probably be more likely to be characterized by an *animus non reverendi* than an escape from a merely preliminary confinement in arrest. So, an escape from confinement while awaiting trial upon a grave charge, which must entail upon conviction a severe punishment, would naturally be more generally so characterized than an escape from an arrest upon a charge of inferior consequence.

Undoubtedly, in the great majority of cases, escape is desertion:<sup>1</sup> the precedents however show that it is not necessarily so; and, upon the mere fact alone that a soldier has liberated himself from military custody, it is not just to convict him of having designed to dissolve his contract and permanently abandon the military service. XXXI, 282, *April, 1871*; XXXV, 626, *October, 1874*; XXXVII, 291, 597, *January and June, 1876*; XXXVIII, 43, *April, 1876*; XLI, 119, *February, 1878*; LIII, 35, *September, 1886*. Of course an escape from legal military custody is always an *offence*, and the soldier who has escaped may (where his act does not amount to desertion) be brought to trial for such offence as "conduct to the prejudice of good order and military discipline." X, 574, *November, 1864*. It need hardly be added that an escape from imprisonment under sentence, effected by a party who has been dishonorably discharged under the same sentence, cannot constitute a desertion, or other offence, the party at the time of escape being no longer in the military service.<sup>2</sup> XXXV, 626, *October, 1874*.

1058. *Held* to be no defence to a charge of desertion that the accused, at the time of the enlistment which he is charged with having abandoned, was an unapprehended deserter from the army: an enlistment of a deserter being not void but voidable only. XXXIV, 499, *October, 1873*; XLVIII, 203, *December, 1883*.

1059. It is no defence to a charge of desertion that the soldier was induced to abandon the service by reason of ill-treatment, want of proper food, &c.: such circumstances can only palliate, not excuse, the offence committed. XXXIV, 411, *August, 1873*. So, in a case of

<sup>1</sup> See cases published in C. C. M. O. 14, H. Q. A., 1880, do. 40, 44, *id.*, 1882; do. 31, *id.*, 1884; do. 279, Dept. of the East, 1885; do. 11, Dept. of the Mo., 1885; do. 18, Dept. of Cal., 1877; do. 123, Dept. of the Dakota, 1882; do. 54, *id.*, 1885; do. 5, Dept. of the Platte, 1873; do. 35, Dept. of Texas, 1875; do. 51, *id.*, 1885.

<sup>2</sup> But see now sect. 5 of the Summary Court Act, approved June 18, 1898.

a Swiss, who, having enlisted in our army, deserted after two years of service, *held* that it was no defence (though, under the circumstances, matter of extenuation) that his act had been induced by an intense *nostalgia* or *maladie du pays*. XXVIII, 426, *April*, 1869. So, *held*, in a case of a desertion by a German, that the fact that he had received a notification from the military authorities of the North German Empire to report at home for military duty under the penalty of being considered as a deserter from the German army, constituted no defence to a desertion committed by him from our service.<sup>1</sup> XXXIV, 411, *August*, 1871.

1060. It is however a complete answer to a charge of desertion before a court martial, that the accused has previously been "restored to duty without trial," as sanctioned by army regulations, provided he has been so restored by competent authority. *i. e.*, the commander who would have been authorized to convene a general court for his trial; otherwise, however, when so restored by a superior not duly authorized. VI, 418, *October*, 1864; 18, 302, *August*, 1887; 21, 223, *December*, 1887.

1061. The forfeiture of the rights of citizenship, and the incapacity to hold office under the United States, imposed upon deserters by the act of March 3, 1863 (Sees. 1906, 1908, Rev. Sts.), can be incurred only upon and as incident to a conviction of desertion by a general court martial, duly approved by competent authority.<sup>2</sup> XXXII, 370, *March*, 1872; XXXIII, 221, *August*, 1872; XXXV, 464, *July*, 1874; XXXVIII, 434, *February*, 1877; XXXIX, 433, *March*, 1878; XLII, 30, *November*, 1878; 3, 221, *February*, 1884; 42, 408, *August*, 1890; Cards 248, *August*, 1894; 2934, *February*, 1897; 3095, *April*, 1897; 4513, *July*, 1898. These disabilities, though attaching to every such conviction, may be removed by an executive pardon of the offender. XXXV, 85, *January*, 1874; 42, 373, *August*, 1890; 56, 56, *October*, 1894; 63, 494, *February*, 1894. But whether a soldier duly convicted of desertion and dishonorably discharged the service may vote at a State election would be determined by the law of the particular State. Card 429, *October*, 1894.

1062. The forfeiture of pay and allowances prescribed for deserters by pars. 129, 1513, 1514, A. R. (1380 and 1381 of 1895; 1557 and 1558 of

<sup>1</sup>As to the principle of the right of expatriation, as asserted in our public law, see Sec. 1999, Rev. Sts.

<sup>2</sup>Such is believed to have been the uniform course of ruling in the civil courts. See *State v. Symonds*, 57 Maine, 148, Holt v. Holt, 59 *id.* 464; *Severance v. Hendey*, 50 N. Hamp., 448; *Goetcheus v. Matthewson*, 61 N. York, 420 and 5 Lansing, 211, 58 Barb., 152; *Huber v. Reily*, 53 Pa. St., 112; *McCafferty v. Conyer*, 59 *id.*, 110, *Kurtz v. Mohitt*, 115 U. S., 487, 501.

As to the liability to make good to the United States the time lost by a desertion, see FORTY-EIGHTH ARTICLE.

1901) can be imposed, in any case, only upon a satisfactory ascertainment of the fact of desertion. The same may indeed legally be enforced in the absence of an investigation by a military court, as, for instance, upon the restoration to duty without trial, by the order of competent authority, under the Army Regulations, of a deserter *as such*. But in general, in this case equally as in that of the statutory liability (see § 1061, *ante*), the forfeiture can safely be applied only upon the trial and conviction by court martial of the alleged deserter. VII, 325, *March, 1864*. The conviction must of course be duly approved; if it be *disapproved*, the soldier cannot legally be subjected to the forfeiture, since he cannot be treated as a deserter in law. XXVII, 262, *September, 1868*; XXXV, 638, *October, 1874*; XXXVI, 82, *November, 1874*. Nor can he be subjected to the forfeiture if he is *acquitted*, though the finding be disapproved by the reviewing authority. XXXI, 19, *November, 1870*. A removal, in orders of the War Department, of a charge of desertion entered by mistake upon the rolls against a soldier, operates to relieve him of any and all stoppages which have been charged against his pay account for forfeitures authorized by the Army Regulations in cases of deserters. XXXIX, 413, *February, 1878*; XLI, 518, *March, 1879*.

1063. The Supreme Court of the United States in *U. S. v. Landers*, 92 U. S. 79, said that for the purpose of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the finding of a court martial; that it is sufficient to justify a withholding of moneys that the fact appears upon the muster rolls of his company. *Held*, therefore, that an order directing discharge without honor on account of desertion is, for administrative purposes, conclusive as to the fact of desertion. Card 7232, *November, 1899*. By this is meant that the fact that a soldier has been discharged without honor on account of desertion is sufficient evidence that he did desert, to justify the Pay Department in withholding pay and allowances due at the time he was charged with desertion. But this should be held to be subject to the power of the Secretary of War to decide with reference to any pending question (any unexecuted matter) within the jurisdiction of the administrative department, that although the discharge cannot be set aside it may be held on sufficient evidence that, notwithstanding the discharge without honor by reason of desertion, the man was not a deserter. Card 8355, *June, 1900*.

1064. A deserter cannot legally be subjected to any forfeiture other than those prescribed by statute or army regulation. He incurs for example no forfeiture of his own personal property.<sup>1</sup> So, where it

<sup>1</sup> See § 824, *ante*.



was proposed to sell certain private property belonging to and left by a deserter and devote the proceeds to the post fund, *held* that there was no legal authority for such appropriation by the military authorities or the Government. XXXV, 454, *June, 1874*. So, a soldier, by reason of having deserted, does not forfeit local bounty money which has been paid him upon enlistment or subsequently, or any other money found in his possession upon his arrest. And such money cannot legally be withheld from him, to be appropriated to a regimental or post fund or any other purpose, but, being his own personal property, unaffected by his offence, must be treated as such. XIII, 329, *February, 1865*; XV, 128, *August, 1865*; XVI, 168, 595, *May and September, 1865*; XXV, 400, *March, 1868*.

1065. A deserter is not chargeable under par. 124, A. R. (126 of 1895; 137 of 1901), with the expenses of transportation therein specified, if his conviction has been duly *disapproved*; such disapproval being tantamount to an acquittal. L, 105, *March, 1886*; Card 2121, *March, 1896*.

1066. Where a sergeant was sent to identify a deserter, supposed to be serving under an assumed name in another organization, with a view to the latter's apprehension, *held* that the sergeant was not a "witness" (*i. e.* at the trial) within the meaning of par. 126, A. R. (137 of 1901), and that therefore the cost of his transportation was, under said paragraph, a proper charge against the deserter as expenses paid for apprehension. Card 3556, *October, 1897*.

1067. Expenses incurred by enlisted men in the pursuit of a particular deserter and therefore on account of his desertion, may properly be charged against him under par. 125, A. R. (136 of 1901), notwithstanding the fact that the person apprehended as such deserter proved to be the wrong man. Card 3185, *May, 1897*.

1068. The *expense of the transportation* of a convicted deserter, incurred in the course of the execution of his sentence, is not chargeable against the deserter under par. 124, A. R. (§ 1065, *ante*), but must be borne by the United States. 52, 21, *February, 1892*.

1069. Where a deserter was acquitted by court martial of stealing certain property, *held* that such acquittal did not relieve him from responsibility for its loss, the same having been caused by his desertion, as found by a board of survey. Card 721, *December, 1894*.

1070. Par. 126, A. R. (see § 1065, *ante*), provides that "a soldier convicted by a court martial of absence without leave will be charged with the expense incurred in transporting him to his proper station." *Held*, that this authorizes a stoppage for transportation and commutation of rations for himself and the guard sent after him. Cards 6068, *March, 1899*; 6375, *May, 1899*; 7180, *October, 1899*; 9177, *October, 1900*.



1071. The reward of thirty dollars, made payable by par. 156, A. R. of 1863, as amended by G. O. 325, War Dept. 1863, is not due merely on the apprehension of a deserter: he must also be delivered "to an officer of the army at the most convenient post or recruiting station."<sup>1</sup> XXVIII, 539, *April, 1869*.

1072. The amount of the reward—to cite from G. O. 325 of 1863—is in full "for all expenses incurred in apprehending, securing, and delivering a deserter." Disbursements made by a *civilian*, where no arrest is effected, are at his own risk, and cannot legally be reimbursed by the military authorities. XX, 470, *March, 1866*.

1073. The legal liability imposed upon the soldier by army regulations, to have the amount of the reward stopped against his pay, is quite independent of the *punishment* which may be imposed upon him by sentence of court martial on conviction of the desertion. Such stoppage need not be directed in the sentence: courts martial indeed have sometimes assumed to impose it, like an ordinary forfeiture of pay, but its insertion in the sentence adds nothing to its legal effect. XII, 326, *February, 1865*.

1074. Where a soldier, charged with desertion, is *acquitted*, or where, if convicted, his conviction is *disapproved* by the competent reviewing authority, he cannot legally be made liable for the amount of a reward paid or payable for his arrest as a deserter, since in such cases he is not a deserter in law. XXVI, 347, *July, 1868*; XXX, 47, *September, 1869*. Similarly *held* where the acquittal was *disapproved* by the reviewing authority. 36, 259, *November, 1889*.

1075. Where a soldier, for whose apprehension as a supposed deserter the legal reward has been paid, is subsequently brought to trial upon a charge of desertion, and is found guilty not of desertion but only of the lesser and distinct offence of absence without leave, he clearly cannot legally be held liable for the reward by a stoppage of the amount against his pay. In such a case, the instrumentality resorted to by the United States for determining the nature of his offence—the court martial—having pronounced that it was not desertion, the Government

<sup>1</sup> The actual payment of the compensation in such cases is authorized by the annual army appropriation acts, which, in appropriating for the incidental expenses of the Quartermaster Department, include as an item—"for the apprehension, securing and delivering of deserters, and the expenses incident to their pursuit."

The fact of the offer of a reward for the arrest of a deserter does not authorize a breach of the peace or commission of an illegal act in making the arrest. See, in this connection, *Clay v. United States, Devereux* (41 Cls., 25, in which an officer, who under the orders of a superior, without previously procuring proper authority from a civil magistrate to enter and search, had broken into a dwelling house for the purpose of securing the arrest of certain deserters, was held to have committed an unjustifiable trespass, and his claim to be reimbursed by the United States for the amount of a judgment recovered against him on account of his illegal act was disallowed by the Court of Claims.

is bound by the result, and to visit upon him a penalty to which a deserter only can be subject, would be grossly arbitrary and wholly unauthorized. Moreover such action would be directly at variance with par. 124 A. R. (126 of 1895; 137 of 1901), which fixes such liability upon the soldier tried, in the event only of his *conviction* of desertion,<sup>1</sup> unless indeed the sentence of the court expressly *stops* the amount.<sup>2</sup> XXVI, 347, *July, 1868*; XXVII, 255, 306, *October, 1868*; XXXI, 468, *June, 1871*; XXXIV, 533, 590, *November, 1873*; XLII, 315, *June, 1879*; 535, *March, 1880*; XLIII, 222, *February, 1880*; 49, 150, *September, 1891*.

1076. To entitle a person to the reward for the arrest of a deserter, the party arrested must be still a soldier. Though, at the time of the arrest, the period of his term of enlistment may have expired, or he may be under sentence of dishonorable discharge, yet if he has not been discharged in fact, the official duly making the arrest, &c., on account of a desertion committed before the end of his term, becomes entitled to the payment of the reward specified in the regulations. Similarly *held*, where the soldier, arrested when at large as a deserter, had been sentenced to confinement (without discharge) and had escaped therefrom. 63, 415, *February, 1894*.

1077. If, in view of the limitation of the 103d Article, the soldier has a legal defence to a prosecution for desertion (G. O. 22 of 1893), the reward is not payable for his apprehension. 55, 264, *September, 1892*; 59, 428, *May, 1893*.

1078. Where the soldier when arrested had been absent but three days, and was still in uniform, and had not been reported or dropped as a deserter, and his company commander had not the "conclusive evidence" of his "intention not to return," referred to in par. 132, A. R. (133 of 1895; 144 of 1901), *held* that there was not sufficient evidence that he was a deserter to justify the payment of the reward for his arrest and delivery. 53, 227, *April, 1890*.

1079. A soldier left his post and was subsequently apprehended and delivered to the military authorities as a deserter by a civil officer. It was supposed that the soldier was a deserter, but upon his return he was adjudged insane. *Held* that the statutory reward could not be legally paid, but advised that the expenses which the officer had incurred he paid him from the appropriation for the contingent expenses of the army; also that a reasonable amount in addition be allowed him for his services and made a part of the expense of caring for and taking the man to the asylum. Card 1407, *June, 1895*.

<sup>1</sup>This conclusion was concurred in by the Attorney General in 16 Opins., 474.

<sup>2</sup>See G. O. 38 of 1890, amending A. R. 125-127 of 1895, 138 of 1901). See also note, page 50, Court-Martial Manual (1901).

1080. The arrest made must be a legal one. Thus *held* that the reward was not payable for an arrest made on the soil of Mexico, involving a violation of the territorial rights of that sovereignty. An act done in violation of law cannot be the basis of a legal claim. *IV*, 412, *March, 1888*; *37*, 495, *January, 1890*; Card 1967, *January, 1896*.

1081. Where the deserter was not arrested by, but *surrendered* himself to, the civil official, who in good faith took him into custody and securely held and duly delivered him, *advised* that there had been a substantial apprehension for the purpose of reward and that the reward was properly payable.<sup>1</sup> *LII*, 293, *June, 1887*; *58*, 134, *February, 1883*; Card 1290, *April, 1895*.

1082. The delivery should be personal and manual on the part of the civil official. Where a soldier who had deserted was sentenced to a penitentiary as a horse thief, and at the end of his term of imprisonment a U. S. marshal caused information that he was a deserter to be conveyed to the commander of a neighboring military post who thereupon had him arrested and brought to the post, *held* that the marshal was not entitled to claim the reward. *50*, 241, *November, 1891*.

1083. So, where a civil official merely informed a captain of artillery that two soldiers serving in his battery were deserters from the Battalion of Engineers, *held* that, though such information was correct, the official was not entitled to the reward; and that the amount of the same, which had been erroneously paid him on the certificate of the captain, should be charged against the latter under par. 736, A. R. (654 of 1895). *34*, 298, *August, 1889*. And see *37*, 495, *January, 1890*.

1084. Under pars. 124 and 126, A. R. (135 and 137 of 1901), the delivery of a deserter to a detachment sent in pursuit of him entitles the civil officer who made the arrest to the reward. Under par. 126, the expense of transportation of the deserter from place of delivery to his station or the place of trial, is a distinct charge not included in the reward. Card 3405, *July, 1897*.

1085. The fact that a deserter was discharged on habeas corpus proceedings on the ground of minority at enlistment, is not ground for refusal of payment of reward for his apprehension. Card 3717, *December, 1897*.

1086. The reward should be withheld where there is evidence of *collusion* between the alleged deserter and the civil official. *Advised* that a suspicion of such collusion was properly entertained in a case where the soldier, after an absence of but a few days, voluntarily surrendered himself at or near the post of delivery to a policeman who turned him over, without expense or difficulty, to the military authorities

<sup>1</sup>See Circ. 1, A. G. O., 1886.

who did not treat him as a deserter but caused him to be charged, tried, and convicted as an absentee without leave only. 44, 64, 100. *November, 1890.*

1087. An officer of the customs, empowered by law to make arrests of persons violating the revenue laws, but having no such general authority as is ordinarily possessed by peace officers "to arrest offenders" (according to the terms of the act of Oct. 1, 1890, authorizing certain civil officials to arrest deserters), *held* not entitled to be paid the regulation reward for the apprehension, &c., of a deserter from the army. 46, 397, *April, 1891.*

1088. *Held* that a justice of the peace of Idaho was not, by the laws of that State, a peace officer or authorized to arrest offenders, and was therefore not within the terms of the act of Oct. 1, 1890, or legally entitled to be paid the reward for the arrest, &c., of a deserter. Such justice may by his warrant authorize and thus cause arrests, but actual arrest pertains, under the laws of the State, to another class—sheriffs, constables, city marshals and policemen. 57, 91, *December, 1892.* But *held* that a member of the Indian police, established under the regulations of the Indian Office, was a civil officer having authority to arrest offenders, and was entitled to the reward for the arrest of a deserter.<sup>1</sup> Card 346, *October, 1894.*

1089. Par. 124, A. R., as amended by par. II. of G. O. 160, Adjutant General's Office, 1899 (A. R. 135 of 1901), in addition to making provision for the payment of a reward of \$30 to a civil officer for the apprehension and delivery of a deserter from the military service provides that the officer making the arrest "will also be reimbursed for actual cost of tickets over the shortest usually traveled route for himself to and from" the place where the deserter is delivered to the military authorities and for the deserter to such place, the total amount not to exceed \$20. *Held*, that the phrase "actual cost of tickets" would not include an expenditure for carriage hire, but payment of items not contemplated by the regulations and not to exceed \$50.00 in all (including the reward), may be paid by special authority of the Secretary of War under the appropriation act (of March 3, 1899), making provision for the payment of reward and expenses. Cards 8586, *July, 1900*; 8916, *September, 1900.* So where a deserter from the United States Army in Porto Rico surrendered to the United States Minister in Venezuela, and the latter sent him back to Porto Rico, but while holding him, incurred an expense of thirty-six dollars for his board, it was *held*, that the expenditure being less than fifty dollars and not being an item provided for in the regulation, should,

<sup>1</sup> See Circ. 12, A. G. O., 1894, revoking par. 1, Circ. 20 of 1893.



before payment, be specially authorized by the Secretary of War. Card 7844, *May, 1900*.

1080. The law authorizes the payment of a reward "for the apprehension, securing and delivery of deserters." In practice the word "deserters" as here used is construed to include soldiers charged with desertion and is not limited to soldiers convicted of desertion. The reward would therefore be payable though the soldier were subsequently discharged without trial. Card 8273, *May, 1900*.

1081. Circular No. 11, A. G. O., 1883, declares that the reward shall not be paid where the deserter, at the time of arrest, "is serving in some other branch of the army," &c. Thus *held* that the reward was not payable for the arrest of a deserter from the cavalry, who, subsequently to his desertion, had enlisted in an infantry regiment in which he was serving at the date of the arrest. 65, 235, *June, 1894*.

1082. Where a civil official, having made an arrest of a deserter, concealed him from the military authorities and afterwards permitted or connived at his escape, *recommended* that the Attorney General be requested to instruct the proper U. S. district attorney to initiate proceedings under Sec. 5455, Rev. Sts. XLI, 481, *December, 1878*.

1083. Every desertion includes an absence without leave. Upon a trial for desertion, the accused is tried also for the absence without leave involved in the offence charged.<sup>1</sup> If acquitted, *without reservation*, of the desertion, he is acquitted also of the lesser offence. If convicted, as he may be, of the lesser offence only, under a charge of the greater, he is acquitted in law of the latter. XXXIII, 123, *July, 1872*. See § 1359, *post*.

1084. The right of the United States to arrest and bring to trial a deserter is paramount to any right of control over him by a parent on the ground of his minority.<sup>2</sup> 58, 287, *March, 1893*; Card 1967, *January, 1896*.

1085. Enlisting in the enemy's army by prisoner of war is desertion, unless submitted to as a last resort to save life or escape extreme suffering, or to obtain freedom. Thus *held* in a case of a U. S. soldier who entered the service of the enemy from Andersonville, Ga., in the civil war, that the burden of proof was on him to establish that he resorted to such enlistment with design of effecting his escape and rejoining his own army; and that his abandoning such enlistment and coming within our lines at the first opportunity was material evidence of such a design. 43, 144, *October, 1890*; 51, 100, *December, 1891*.

1086. A soldier who had been extradited from Mexico solely on a

<sup>1</sup> See 13 Opins. At. Gen., 460.

<sup>2</sup> *In re Comenow*, 37 Fed. Rep., 668; *In re Kaufman*, 41 *id.*, 876. And compare *In re Grimley*, 137 U. S., 147, and *In re Morrissey*, *id.*, 157.



charge of theft, *held* not liable to trial as a deserter; the principle that a person extradited on account of a certain alleged offence is exempt from trial on any other criminal offence<sup>1</sup> being deemed applicable where the other offence is a military one. 37, 495, and 38, 167, *January, 1890*; 49, 62, *September, 1891*. A deserter from our army cannot, in the absence of any international convention allowing it, legally be arrested as such in Mexico and brought thence into Texas. 39, 458, *March, 1890*.

1097. The amenability to trial of a deserter from an enlistment in the army is not affected by the fact that when he enlisted he was a deserter from the Marine Corps. XLVIII, 203, *December, 1883*.

1098. *Held* that a deserter from a volunteer regiment was, after the disbandment of the volunteer army, no longer amenable to the military jurisdiction, having become thereupon a *civilian*. 42, 406, *August, 1890*; 50, 192, *November, 1891*; Card 404, *October, 1894*. The liability of such a deserter to trial and punishment by court martial continues, notwithstanding the muster out of his own regiment, until the entire volunteer army has been mustered out of service. Cards 6410, 6433, *May, 1899*; 6593, *June, 1899*; 9005, *September, 1900*.

1099. A civil employee of the Quartermaster Department does not become liable as a *deserter* by abandoning his employment. L, 226, *April, 1886*.

1100. The so-called "deserter's release," provided for by G. O. 55 of 1890, is accorded when, by reason of the period which has elapsed since the end of his term of enlistment, the deserter could successfully plead the statute of limitation to a prosecution for his desertion. This period is complete at the expiration of two years from the end of his term of enlistment, exclusive of absences meanwhile from the United States. But where a soldier, who would have been eligible for such release on May 9th, 1894, was, in February preceding, arrested, brought to trial, convicted and sentenced to be dishonorably discharged, and was so discharged accordingly, *held* that he was not within the privilege of the general order, and that the release could not be accorded him.<sup>2</sup> 65, 189, *June, 1894*; Card 4130, *May, 1898*.

1101. The "deserter's release" is intended for deserters in whose favor the limitation of the present 103d Article of War has fully run, and who therefore have a perfect defence to a prosecution. It was designed to secure them against proceedings for desertion and to avoid the expenses to which the Government might be put in the matter of their arrest and trial. But it is not, and cannot, in view of the provisions of the 4th Article of War, serve as a discharge from the army.

<sup>1</sup> U. S. v. Ranscher, 119 U. S., 407.

<sup>2</sup> See Circ. 5, A. G. O., 1894, as to the purpose and effect of the "release."

The language of G. O. 55 of 1890, which describes it as a release "from the army" is therefore faulty. 52, 326, *March, 1892*; 61, 430, *September, 1893*; 62, 1, *October, 1893*; 63, 30, *December, 1893*; 347, *February, 1894*.

1102. A deserter who has been once dishonorably discharged is not a subject for the "release"—does not belong to the class of persons for whom it is intended. 63, 32, *December, 1893*. It is designed for soldiers actually in service. It cannot therefore now be given to one who was a soldier of a volunteer organization during the war of the Rebellion. 62, 1, *October, 1893*. Nor can it be issued in a case of a soldier who has deceased. 52, 326, *March, 1892*. As it is only issued in cases of deserters who may successfully plead the limitation of the present 103d Article, it should not be given where the desertion was committed in time of war. Card 96, *July, 1894*.

1103. The persons from whose military record there may be a removal of the charge of desertion, under the act of March 2, 1889, c. 390, are those against whom such a charge is "now standing." Deserters, therefore, whose cases had, at the date of the act, been judicially duly disposed of—by trial, conviction and sentence by court-martial—are not within the purview of the statute. LIII, 143, *October, 1886*; 18, 296, *August, 1887*; Card 359, *September, 1894*. Similarly held with respect to deserters restored to duty without trial. In both cases (conviction by court martial and restoration without trial) the charge of desertion no longer remains, but the fact of desertion has become a matter of record and cannot be removed. Cards 2021, 2025, *January, 1896*; 2080, *October, 1896*; 2934, *February, 1897*.

1104. Held that a soldier had "served faithfully" in the sense of sec. 1 of the last-named act, when, having been sentenced to reduction and confinement on conviction of desertion, his sentence had been duly executed, and he had thereupon returned to duty and served for a considerable further period in a status of honor. 36, 184, *October, 1889*. Whether a soldier served "faithfully" within the meaning of the act is a matter for the Secretary of War to determine. The fact that a soldier may have been tried and punished by court martial does not *per se* render his service unfaithful. Each case should be decided upon its own merits. Card 3036, *March, 1897*.

1105. The act of 1880 provides that the charge of desertion shall be removed if the soldier has "served faithfully until \* \* \* May 1st, 1865, having previously served six months or more" \* \* \*. Held that the six months of service need not have been continuous provided they were actually served before May 1st, 1865, and the soldier was in service at that date. 48, 219, *July, 1891*.

1106. Where a soldier was insane at the time of his desertion held

that the charge of desertion should be removed. Card 670, *November, 1894*.

1107. *Held* that a soldier was not within the description of the "third" division of sec. 2 of the act of 1889, of having been "discharged" from service by a court of "competent jurisdiction," who had, as a minor enlisted without consent, been discharged upon *habeas corpus* by a State court.<sup>1</sup> 32, 313, *May, 1889*.

1108. A soldier, who enlisted August 16, 1862, for three years, deserted May 16, 1864, was arrested April 20, 1865, and again deserted September 29, 1865. There was thus two charges of desertion standing against him. Under the President's proclamation of March 11th, 1865, all deserters who returned to service within sixty days were pardoned "on condition that they \* \* \* serve the remainder of their original terms of enlistment and in addition thereto a period equal to the time lost by desertion." And a War Department circular of May 29, 1865, provided that when deserters had been arrested during the continuance of the said proclamation they should be entitled to its benefits. In the particular case under consideration the soldier was arrested during the continuance of the proclamation and was therefore pardoned on the conditions named therein. He thus became obliged to serve until July 29, 1866, but as he failed to comply with this condition by deserting September 29, 1865, *held* that both charges of desertion should be allowed to stand against him. Card 1390, *July, 1895*.

1109. A soldier, who had successively enlisted in and deserted from two companies of the same volunteer regiment, returned in response to the President's proclamation of March 10, 1863, and served out his first enlistment. *Held* that the proclamation operated as a pardon for both of his desertions, and that he should be treated as discharged from his second enlistment by his restoration to duty in the first. Card 3447, *August, 1897*.

1110. The act of May 17, 1886, provided that, where a soldier of the war of the rebellion deserted from one organization and within three months enlisted in another, the charge of desertion, if certain facts were shown, should be removed and a certificate of discharge issued from the organization in which he first served. *Held* that the purpose of this legislation was to change the status of beneficiaries under it from that of deserters to that of soldiers honorably discharged as of the date of their desertion. Card 2090, *March, 1896*.

1111. Sec. 3 of the act of March 2, 1889, provides for the removal of a charge of desertion if the following three conditions are fulfilled, viz: 1. That the soldier enlisted again within four months of the desertion; 2. that he served such term faithfully; and 3. that such re-enlistment

<sup>1</sup> But see the provision as amended by act of March 2, 1891 (1 Sup. Rev. Sta. 901).

was not made for the purpose of securing bounty, etc. A soldier deserted on December 6, 1861, and enlisted on the 13th of the same month in another regiment, deserted from the latter regiment on January 8th, 1863, enlisted on the 15th of that month in a third regiment and was honorably discharged from this enlistment. Each of the last two enlistments was made within four months of the desertion in the preceding enlistment and neither of them was made for the purpose of securing bounty, etc. *Held*, therefore, that as he served the third enlistment faithfully the charge of desertion pertaining to the second enlistment was properly removed, but that such removal and the consequent issue of an honorable discharge did not affect the fact that he did not serve that enlistment faithfully. Further *held*, therefore, that the charge of desertion pertaining to the first enlistment could not be removed. Card 3928, *March, 1898*.

1112. While the first section of the act of March 2, 1889, provides that the charge of desertion standing against a *volunteer* soldier who served until May 1, 1865, and had previously served six months shall be removed, etc., there is no good ground for holding that the act as a whole contains any provision that would warrant taking May 1, 1865, as the close of the war, so far as a soldier of the regular army is concerned, or as a date before which a desertion must have occurred to make sec. 3 of the act applicable. Thus where a soldier who had enlisted in the regular army on March 17, 1864, deserted August 20, 1865, and eleven days thereafter enlisted in another regular regiment not for the purpose of bounty, etc., and was honorably discharged therefrom, *held* that the charge of desertion should be removed. Card 3891, *March, 1898*.

1113. A volunteer soldier, having enlisted in 1861 for three years, deserted in 1862 and within a month enlisted in the navy for one year, from which enlistment at the expiration thereof he received an honorable discharge. He thus escaped in fact one year's service under his army enlistment. *Held* that his thus avoiding one year's service was not a gratuity within the meaning of sec. 3 of the act of March 2, 1889, and did not preclude the removal under that section of the charge of desertion. Cards 163, *August, 1894*; 3080, *April, 1897*.

1114. By section 13, of the enrollment act of March 3, 1863, a drafted man who failed to report to the board of enrollment was declared "a deserter" and triable therefor by court martial. *Held* that this section imposed upon him the single duty of reporting to the enrollment board, and to that extent and for that purpose only gave him a military status; that prior to his acceptance or rejection by the board, he was not fully in the military service of the United States,



nor a soldier within the ordinary meaning of that term. Where such a drafted man failed to report and subsequently within four months enlisted elsewhere, *held* upon an application by him to have the charge of desertion removed under the act of March 2, 1889, that not being a soldier in the military service within the meaning of the act at the time he became a "deserter," the same did not apply to his case and that therefore the charge could not be removed. Cards 2041, 2042, *May, 1896.*

1115. Sec. 7 of the act March 2, 1887, provides that the charge of desertion shall not be removed if the soldier left his command while in arrest or under charges for breach of military duty. Where a soldier deserted in 1865, while in arrest and under charges for breach of military duty, *after* the expiration of his term of enlistment, it was held that he was still a soldier at the time he deserted and that therefore the section named applied in his case and precluded a removal of the charge of desertion. Card 3000, *April, 1897.*

1116. *Held* that a charge of desertion entered against a soldier in a particular term of enlistment is removed by an honorable discharge from such enlistment. Card 2041, *May, 1896.*

1117. A pardon does not operate retroactively, and cannot therefore "remove a charge" of desertion. L. 395, *June, 1886*; 42, 406, *August, 1890*; 43, 36, *September, 1890.* It does not wipe out the fact that the party did desert, nor can it make the record say that he did not desert. It cannot change facts of history. 58, 446, *March, 1893.*

1118. A deserter at large from the volunteer army was drafted in 1864, and served as a drafted soldier until mustered out. *Held* that his status as such drafted soldier was unaffected by the fact that he was in desertion at the time he was drafted; nor was his status as a soldier in desertion affected by his being drafted or by his service as a drafted man. Card 2106, *March, 1896.*

1119. Ordinarily desertion would be sufficient evidence that service during the term in which it occurred was not honest and faithful, but if in an exceptional case the Secretary of War should decide that it was, notwithstanding the desertion, he would be acting within his discretion under the act of August 1, 1894. The provision in the act of June 16, 1890, that desertion renders service not honest and faithful is limited to the purposes of that act and does not control enlistments under the act of 1894. Cards 2004, *January, 1896*; 2121, *March, 1896*; 3530, *September, 1897*; 3794, *June, 1898.*

1120. When a soldier deserts from one regiment and enlists in another he may be held to serve out both enlistments or either of them. In the latter case all that need be done is for the Government to aban-



don the enlistment in one regiment (ordinarily by a discharge therefrom without honor) and recognize the enlistment in the other. No transfer is necessary. Card 2115, *March, 1896*.

1121. There is no law extending amnesty to soldiers who are now deserters from the U. S. army. Card 778, *December, 1894*.

1122. The restoration of a deserter to duty without trial under par. 128, A. R. (139 of 1901), does not operate as an acquittal, or relieve the deserter from the forfeitures of pay incurred by operation of law under pars. 1513 and 1514, A. R. (1380, 1381 of 1895; 1557, 1558 of 1901.) L. 122, *March, 1886*; 21, 224, *December, 1887*. Nor does it operate to remove the charge of desertion and substitute therefor that of absence without leave. Card 4076, *April, 1898*.

#### DISBURSING OFFICER.

1123. A disbursing officer of the army who has paid out public moneys upon vouchers which prove to have been false or forged is personally responsible to the United States for the amount of the loss; and it is the usage of the Government to hold such an officer so responsible, however innocent of criminality he may be; the fact that he has acted in good faith not affecting his legal liability. Such an officer, further, is not entitled to call upon the Government to prosecute a civil suit against the party chargeable with the fraud, but he may legally himself initiate such a suit if he desires to do so for his own indemnity. XVI, 635, *October, 1865*; XXVIII, 20, 42, *August, 1868*; XXXII, 423, *March, 1872*.

1124. It is in accordance with the usage of the military service, as well as the general practice under existing laws, for an officer of the army charged with the disbursement of public funds to pursue in his own name and representative capacity the proper legal remedies when such funds are illegally appropriated or withheld by third parties. This official function of the officer cannot properly be imposed upon the head of his department. The Secretary of War cannot be required to institute the legal proceedings, nor would his doing so make the claim any more a public claim of the United States than it is as prosecuted by the disbursing officer in his official capacity. Thus *advised*, in the case of such an officer, a portion of whose public funds were in the possession of a bank, as an authorized public depository, at a time when the same stopped payment and went into insolvency, that the officer should file and prove his claim before the Register in Bankruptcy and prosecute the collection of the same so far as necessary and practicable; and further that a due and reasonable diligence on his part in pursuing the legal measures open to him for realizing the amount for which he was officially responsible would furnish the

strongest support to any application, which he might in future prefer, to be discharged from liability for any loss to the United States resulting from the failure of the depository. XXXV, 365, *May, 1874*.

1125. Congress, in appropriating money for the new State, War and Navy Building, has provided that the amounts shall "be expended under the direction of the Secretary of War." While the Secretary would thus be authorized to commit the disbursing of the funds employed to any proper person, yet *advised*, in view of the policy of the law as expressed in Sec. 1153, Rev. Sts., that the Secretary would properly designate as the disbursing agent the engineer officer engaged in superintending the work, especially since—as provided in said section—the duty of disbursing would thus be performed without any charge to the United States. XLI, 288, *June, 1878*.

1126. Sec. 3620, Rev. Sts., provides that a disbursing officer, having on deposit in a public depository public moneys intrusted to him for the purpose of disbursement, shall "draw for the same only in favor of the persons to whom payment is made." Where, upon the order of a party to whom the United States was indebted in a certain amount, a disbursing officer made payment of the amount to a firm to which such party was indebted *advised* that such payment was clearly in contravention of the statute. 53, 239, *April, 1892*.

1127. Upon construing Sec. 1766, Rev. Sts., in connection with the original act—that of January 25, 1828, entitled "An Act to prevent defalcations on the part of the disbursing agents of the Government"—*held* that such section, though expressed in somewhat general terms, properly applied only to bonded disbursing officers.<sup>1</sup> 61, 167, *August, 1893*.

1128. *Held* that the act of April 20, 1874, c. 117, entitled "An Act to provide for the inspection of the disbursements of appropriations made by officers of the Army," applied only to the inspection of disbursements of monies appropriated by legislation of Congress. 48, 184, *July, 1891*.

1129. Any officer of the United States "having any public money entrusted to him for disbursement" is a "disbursing officer" within the meaning of Secs. 3620 and 5488, Rev. Sts. *Held*, therefore, that medical officers entrusted with moneys for disbursement under general orders 116 and 136 A. G. O. 1898, were such disbursing officers. Card 5269, *November, 1898*. But *held* that the moneys received by the quartermaster in charge of a U. S. transport from parties travelling thereon, for meals furnished them can be applied, under Sec. 3618, Rev. Sts., and the act of March 3, 1875 (18 Stat., 410), to the purchase of fresh supplies.<sup>2</sup> Card 5048, *October, 1898*.

<sup>1</sup> But see the general provision of the Army Appropriation Act of June 16, 1892, in regard to the withholding of the pay of officers under this section.

<sup>2</sup> See Dig. Dec. Second Comp., vol. 3, p. 324.

## DISCHARGE.

1130. The classification of discharges has never been assumed by Congress but has been left by it to the Executive branch of the Government. Card 2731, *November, 1896*. At present there are three kinds of discharges expressly recognized, to wit: The honorable, the dishonorable, and the discharge without honor. The dishonorable discharge is given only in the case of discharge by sentence of court-martial. The discharge without honor is given in the cases first specified in circular 15, Headquarters of the Army, 1893; but this circular did not *create* such discharge; it merely gave it a name. Before the issue of the circular and as far back as the rebellion (notwithstanding that it was from time to time theoretically asserted that the only kind of discharges known to the law were the honorable and the dishonorable, and that all discharges except by sentence of court-martial were honorable) a third kind of discharge was out of necessity resorted to. It is now recognized that there is a kind of discharge which is neither honorable nor technically dishonorable, but must be classified by itself—this is the “discharge without honor.” There were many soldiers summarily discharged during the rebellion for causes tainting the character of their discharges. In numerous cases the orders were made to read *dishonorably* discharged, although a dishonorable discharge in the technical sense of that term cannot be imposed except by sentence of a court-martial. A summary discharge, cannot be a dishonorable discharge, if the term is used in such technical sense, but it may be for a cause tainting the character of the discharge a discharge manifestly not honorable. Such a summary discharge is now called a discharge without honor. Its name however is only important as a recognition of a discharge, not technically dishonorable, but not honorable in fact. (See X, 286, *September, 1864*.) It might not be going too far to say that when soldiers were summarily “dishonorably discharged” during the rebellion the order was so worded simply because the soldier had done something to disgrace the service, and could not be in fact honorably discharged. 60, 241, *Jan., 1893*. Thus where a volunteer soldier under arrest for desertion was “dishonorably discharged” by order on account primarily of the desertion, *held* that while his discharge was not technically dishonorable, it was what is now called a discharge without honor, and therefore not honorable. Card 2128, *March, 1896*. The term also covers the summary dismissal of an officer. 52, 403, *March, 1892*; Card 1503, *August, 1895*.

1131. On the question whether a discharge by order (summary) was of the class designated as not honorable, *i. e.* without honor, *held* that

in the absence of express evidence that such discharge was given on account of an unfitness for the service for which the person discharged was culpably responsible, or by reason of fraud in the enlistment, or when the person at the time of his discharge was in a status of dishonor, *i. e.* in confinement under the sentence of a general court-martial or of a civil court, the discharge should be deemed honorable. Card 270, *September, 1894.*

1132. The discharge without honor is not a punishment. When a soldier is discharged before or on expiration of service, he is entitled to a certificate to that effect, but he is not entitled to a certificate of honorable discharge (which is now only given to soldiers whose service has been honest and faithful) if in fact his service has not been honest and faithful. In such case he has failed to earn an honorable discharge and is given a discharge which discloses that fact—a discharge without honor.<sup>1</sup> This discharge carries with it forfeiture of retained pay, if any, as an incident, not of the discharge but of the failure to render honest and faithful service. Not being a discharge “by way of punishment for an offence” (Sec. 1290, Rev. Sts.), forfeiture of travel allowances is not an incident of it.<sup>2</sup> But when a soldier is discharged without trial on account of fraudulent enlistment, or “for disability caused by his own misconduct” (*i. e.* “without honor”), travel allowances are forfeited; in the first case by reason of the right of the Government, on the discovery of the fraud, to rescind the contract of enlistment and thus avoid all unexecuted obligations under it, and in the second under the provisions of the Army Appropriation Act, approved March 16, 1896. Cards 1862, *November, 1895*; 1906, *December, 1895*; 6569, *June, 1899*. But a soldier discharged without honor, except for fraudulent enlistment, does not forfeit clothing money due him at date of discharge. Card 2107, *March, 1896.*

1133. A company of volunteers having in 1862 refused to proceed to a certain point when ordered to go there, was subsequently duly mustered out because of its refusal to obey the order. *Held* that the members of the company were discharged without honor. Card 1915, *December, 1895.*

1134. *Held* that the discharge of a cadet from the United States Military Academy, in 1862, for demerits in excess of the limit fixed, was what is now known as a discharge without honor. Card 2533, *August, 1896.*

<sup>1</sup>The discharge without honor has been given upon the remission of a sentence (S. O. 169, A. G. O., July 26, 1893; also where sentence was set aside on account of fatal defect in record (par. 56, S. O. 257, A. G. O., 1898).

<sup>2</sup>Concurred in by the Comptroller of the Treasury under date of Dec. 11, 1895, overruling last paragraph of sec. 880 and section 1449, Digest Dec. Second Comptroller, Vol. 3, 1884-1893.



1135. A volunteer officer was summarily dismissed on account of unfitness caused by his own fault. *Held*, that his discharge was without honor. 52, 403, *March, 1892*. Similarly *held* where the officer was summarily "dropped" for absence without leave. 46, 389, *April, 1891*.

1136. But where an officer of volunteers was examined as to his qualifications by a board of officers under "an act to provide for the examination of certain officers of the army," approved June 25, 1864, and was reported mentally disqualified for the duties of his office and was thereupon dismissed by executive order in accordance with the provisions of the act, *held* that the dismissal was in effect an honorable discharge from the service.<sup>1</sup> 46, 333, *April, 1891*; 65, 31, *May, 1894*.

1137. A soldier was tried by court martial for offences which, upon conviction, would have justified his discharge, but having been *acquitted* by the court, *held*, that his discharge without honor, primarily on account of said alleged offences would not be proper. Card 1058, *February, 1895*.

1138. The statement of character being no part of the discharge, *held*, that the discharge "without character" given when a soldier's character has not been sufficiently good to allow of his re-enlistment (par. 148, Army Regulations, 1895) is in legal effect an honorable discharge. 30, 169, *February, 1889*; Cards 352, *September, 1894*; 404, *November, 1894*.

1139. Where a soldier's service has been honest and faithful, *held*, that discharge without character was improper. Card 2230, *April, 1896*.

1140. An executed honorable discharge cannot be revoked unless obtained by fraud on the part of the soldier. Mere mistake on the part of the officers executing it will not justify revocation. Card 2700, *October, 1896*. The same is equally true of a discharge without honor when once duly executed. Cards 2099, *March, 1896*; 2423, *July, 1896*; 9028, *September, 1900*. An order directing a discharge may of course be revoked or suspended at any time before the discharge ordered has actually taken effect. XXIX, 508, *January, 1870*. An order purporting to revoke an executed honorable discharge, not obtained by fraud, and substituting therefor a dishonorable one, *held*, wholly unauthorized and illegal. VI, 478, *November, 1864*; XI, 197, *December, 1864*; XX, 584, *April, 1866*; XXV, 541, *May, 1868*; Cards 2700, *supra*; 1200, 1339, *April and May, 1895*; 2543, *August, 1896*. Similarly *held*, respecting the substitution of an honorable discharge for an executed legal discharge without honor, or for an exe-

<sup>1</sup> See Circ. 4, A. G. O., 1891.



cuted legal dishonorable discharge. Cards 605, *November, 1894*; 1382, *May, 1895*; 2099, *March, 1896*; 2174, *April, 1896*; 6378, *July, 1899*.

1141. A soldier was duly discharged pursuant to an order from the War Department. The order was issued under a misapprehension in regard to his actual status at the time—a mistake of fact—which if discovered would have deferred or prevented the issuing of the order. *Held*, that the mistake of fact did not invalidate the discharge; that having been duly executed, it could not be revoked. 61, 421, *September, 1893*. Cards 1876, *November, 1895*; 1791, *January, 1896*.

1142. Where a soldier, by making an alteration in his "descriptive list" so as to cause it to appear that his term of enlistment, which was in fact five years, was three years only, induced the regimental commander to give him an honorable discharge at the end of three years' service; *held*, upon the fraud being presently discovered, that the discharge might legally be revoked and the soldier be brought to trial by court martial under the 90th (now 62d) Article of War. XXI, 390, *May, 1896*. But where by competent authority an honorable discharge was given to a soldier who was at the time in arrest under charges, *held* that such discharge—no fraud being imputable to the soldier—could not legally be revoked. XXIII, 483, *May, 1867*.

1143. Where a soldier, before the expiration of his term, received under the 4th Article of War a discharge in due form, though charges were then pending against him, the authority ordering the discharge not having been made aware of such charges, *held* that the discharge was executed and could not be revoked with a view to bringing the soldier to trial; that he had, by the discharge, duly become a civilian and was no more than any other civilian under the control of the military authorities. 50, 295, *November, 1891*; Card 1791, *January, 1896*.

1144. The fact that a soldier has been a deserter does not preclude his receiving an honorable discharge, if either he be restored to duty without trial, or having been tried and sentenced, he yet, by reason of his imprisonment being fully executed or being remitted before the end of his term, is returned to duty and is in the performance of faithful service when his term is completed. An honorable discharge then given to him is an authoritative declaration by the Government that he leaves the military service in a status of honor. Thus honorably discharged he cannot, by reason of his having formerly deserted, be deprived of any rights to pay, allowances or bounty usually incident upon honorable discharge.<sup>1</sup> XXVI, 484, *March, 1863*.

1145. A soldier while a deserter again enlisted, was allowed to serve such second enlistment, and did so honestly and faithfully; *held* that

<sup>1</sup> This opinion is quoted and adopted by the U. S. Supreme Court in *United States v. Kelly*, 15 Wallace, 34, 36.

he was entitled at the end of the term, being in respect to this term in a status of honor, to an honorable discharge from it. But this did not affect his other enlistment; as to that he should be treated as a deserter. 43, 48, *September, 1890*; Card 902, *February, 1895*.

1146. Where a court martial, in imposing dishonorable discharge in connection with confinement, directs that the discharge be first executed; or where it is reasonably to be inferred from the terms of the sentence that it was the intention of the court that the punishments should be executed in this order; the reviewing officer, in approving the sentence, is not empowered to command that the execution of the discharge be postponed to the end of the term of confinement.<sup>1</sup> XXXII, 390, *March, 1872*; 529, *April, 1872*; XXXIV, 32, *November, 1872*; 589, *November, 1873*; XXXVII, 22, *June, 1875*. On the other hand, if the sentence clearly imposes the dishonorable discharge of the soldier at the end of the term of confinement, the reviewing officer is not authorized to direct that he be discharged forthwith. XXXVII, 456, *January, 1869*. A dishonorable discharge given in the latter case at the beginning instead of at the end of the term, would not be given pursuant to the sentence and should therefore be set aside as void and inoperative, the man taken up again as a soldier and the discharge given at the end of the confinement as directed by the sentence. Card 5968, *March, 1899*.

1147. Where a court martial sentenced a soldier, in connection with confinement, to be dishonorably discharged at such date as might be fixed by the reviewing officer, *advised* that such a sentence was illegal as devolving upon the reviewing officer a duty pertaining to the court.<sup>2</sup> XXXIII, 401, *October, 1872*.

1148. *Held*, that a soldier may be summarily discharged while in confinement under sentence, but a summary discharge under such circumstances would not only discharge him from the service but would effect a remission of so much of the sentence as remained unexecuted on the date of the discharge.<sup>3</sup> 53, 409, *May, 1892*; Cards 1906, 1907, and 1912, *December, 1895*.

1149. A sentence of dishonorable discharge (even when ignominious, as when accompanied by drumming out) entails *per se* no disqualification for civil employment under the United States.<sup>4</sup> VIII, 91, *March,*

<sup>1</sup>See an opinion of the Judge-Advocate General on this subject, published and approved by the Secretary of War in G. O. 71 War Dept., 1875.

<sup>2</sup>See an opinion to this effect published, as approved by the Secretary of War, in G. O. 90, War Dept., 1872.

<sup>3</sup>That a discharge by reason of expiration of term of service given pending the execution of a period of confinement, which extends beyond the term of enlistment, does not have such effect, see G. O. 138, A. G. O., 1890.

<sup>4</sup>Sec. 2 of the act of August 1, 1894 (28 Stats., 216), provides that "no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful."

1863; XXVIII, 250, *November, 1868*; XXXI, 296, *April, 1871*; XXXIV, 623, *November, 1873*.

1150. Where a soldier has been legally sentenced to be dishonorably discharged and such sentence has been duly executed, it is beyond the power of the Executive, whatever the merits of the case, to substitute an honorable in lieu of the dishonorable discharge. The latter having gone into effect cannot be undone;<sup>1</sup> moreover the soldier, having been thereby wholly detached from the military service and made a civilian, can not again be discharged from the service until he has been again enlisted into it. XXXVII, 330, *March, 1876*; 510, *May, 1876*; XXXVIII, 236, *August, 1876*; 605, *May, 1877*; XLI, 465, *November, 1878*; Cards 2174, *April, 1896*; 2776, *December, 1896*; 3800, *January, 1898*; 5234, *January, 1899*; 7448, *January, 1900*.

1151. The Secretary of War may by an act of Congress be authorized and required to amend the rolls and records so as to show that a soldier was honorably discharged as of the date on which he was in fact dishonorably discharged, and give him a discharge certificate to that effect. Card 2047, *February, 1896*.

1152. The formal certificate of discharge signed as required by the 4th Article of War, and furnished the soldier is legal evidence of the fact of discharge, and of the circumstances, when stated, under which it was given.<sup>2</sup> It is furnished the soldier primarily for his use, but not being a record, the statements therein are not conclusive upon the Government when contradicted by record or better evidence. 51, 126, *December, 1891*. Thus an entry on a certificate of discharge of the date of enlistment is a copy from the original record of that fact. If this entry is erroneous it may be corrected by the War Department by substituting a new and correct certificate of discharge or, as is done in practice, by endorsing on the old certificate a statement that the records of the department show, etc. 49, 87, *September, 1891*.

1153. The discharge of a soldier takes effect when he receives notice thereof actual (as by the delivery to him of the certificate of discharge) or constructive.<sup>3</sup> The opinion heretofore held that "the discharge takes effect, like a deed upon delivery" (XXIX, 599, *January, 1879*;

<sup>1</sup> 4 Opins. At. Gen., 271.

<sup>2</sup> *Hanson v. S. Scituate*, 115 Mass., 336; *Bd. of Comm. v. Mertz*, 27 Ind., 103; *U. S. v. Wright*, 5 Philad., 286.

<sup>3</sup> "Officers discharged to take effect from a particular anterior date, who do not receive notice of their discharge until sometime afterwards, and who in the meantime continue on duty, are entitled to pay to the date when notice of discharge was received." Dig. Dec., Second Comptroller, vol. 1 (1890), § 1144.

"An officer on detached service at the time his regiment was discharged, and actually performing duty as an officer of such regiment until he received notice of his discharge, is entitled to pay up to the date of such notice." *Ib.* § 1146.

"The discharge of a soldier can only take effect on the date and at the place where he receives notice, or is legally chargeable with notice, of his discharge." Decision of the Comptroller, dated April 18, 1900 (Circ. 253, P. M. G. O., 1900).

XLVII. 170, *June, 1883*) fails to distinguish between the fact of discharge and the certificate of discharge, and is therefore erroneous except so far as it may be held to support the proposition that a discharge takes effect upon delivery of the discharge certificate when such delivery constitutes the notice to the soldier that he has been discharged. But the discharge certificate—often called the discharge—is not really the discharge; nor is the delivery of it, actual or constructive, to the soldier the only means of giving him notice that he has been discharged. Such delivery would be a proper and effective notice, but to in fact release him from control (when he has been discharged) and inform him verbally or otherwise of his discharge, would constitute equally effective notice. Cards 1570, *July, 1895*; 1916, *December, 1895*; 5632, *January, 1899*. Where a soldier immediately upon enlistment was imprisoned on suspicion of being a deserter and "bounty jumper" but was subsequently released and sent away from the army without a certificate of discharge by an officer authorized to summarily discharge him, *held*, that the soldier was thereby discharged, and upon satisfactory proof being furnished that the suspicion against him was erroneous, further *held* that his imprisonment during the whole of his service being through no fault of his own did not deprive him of his right to a certificate of honorable discharge. *Advised* that one be issued him. Card 1916, *supra*.

1154. An officer or soldier actually serving to a given date cannot legally be mustered out or discharged as of a prior date. 44, 450, *January, 1891*; 46, 101, 223, 243, *March and April, 1891*; 51, 126, *December, 1891*. But where certain volunteer officers duly absent from their commands were on May 6, 1865, ordered by the President to be honorably mustered out of service "of date of 15th instant," the said officers to immediately apply by letter for their muster-out and discharge papers, *held*, that they ceased, by virtue of that order, to be officers on the date last named, though the muster-out and discharge papers may not have reached them until after such date. Cards 1636, *October, 1895*; 1945, *December, 1895*.

1155. Dishonorable discharge imposed by sentence of a general court martial cannot be executed until the order promulgating such sentence has been received at the place where the same is to be executed. The discharge, if to take effect forthwith, should be dated as of the day on which the order is received; and the soldier is entitled to be paid to include the date of his discharge, if any pay be due him. If confinement has also been awarded, the certificate of discharge is in practice committed to the custody of the post commander or other proper official to be held by him until the confinement has been executed and then delivered to the party entitled to it. 41, 86, *May, 1890*; Card



1767, *October, 1895*. But where the records fail to show the actual date of the dishonorable discharge, *held* that the date of the order promulgating the sentence should be taken as the date of the discharge. 42, 474, *September, 1890*; 59, 195, *April, 1893*; Cards 1226, *April, 1895*; 3810, *January, 1898*.

1156. A soldier should not be discharged on the day of the expiration of his term if he is then awaiting sentence of court martial. No soldier in such a status can be *entitled* to his discharge till the result of his trial is published.<sup>1</sup> 47, 338, *May, 1891*.

1157. The act of desertion does not operate as a discharge. The name of a deserter is dropped from the proper rolls and is not again taken up until his apprehension or surrender; but he is in no sense discharged from the army. 63, 30, *December, 1890*. Nor can an official publication in orders of a sentence of dishonorable discharge have the effect of discharging a soldier; there must still be notice, actual or constructive, of the fact of discharge.<sup>2</sup> Cards 404, *October, 1894*; 3063, *April, 1897*. While a soldier is, at the end of his term of enlistment, entitled in general to be at once formally discharged, he cannot discharge himself by simply leaving the service at such time. 54, 300, *July, 1892*. The final statements required by the Army Regulations to be furnished with the discharge are no part of it; the discharge is complete without them. L. 494, *July, 1886*.

1158. The statement of "character" appended to the certificate is no part of the discharge. It is a general rule that the character to be given a soldier on his discharge is discretionary with his company or other immediate commander (G. O. 74, A. G. O. 1881), and that the superior of such commander has no authority over the matter.<sup>3</sup> 30, 169, *February, 1889*.

1159. *Held* that the object of the "deserter's release" should be to protect the deserter from arrest and the Government against expenses attending the same—and that it should be prepared in such a way as to preclude the claim that it operated as an actual discharge from the service.<sup>4</sup> 63, 247-354, *February, 1894*.

1160. While a volunteer soldier was absent in desertion, the volunteer armies were disbanded under an act of Congress. *Held* that the soldier upon the disbandment ceased, by operation of law, to be a deserter and became a civilian; that his military record, so far as the War Department was concerned, ended with the proper entry of the fact of his desertion; that in the absence of statutory authority the War Department was without power to legally discharge the soldier

<sup>1</sup> See A. R. 152 a, published in G. O. 138, A. G. O., 1890 (160 of 1901).

<sup>2</sup> But see now par. 148, A. R. of 1895 (162 of 1901).

<sup>3</sup> The "deserter's release" now in use conforms to these requirements. See sec. 11, Circ. 5, A. G. O., 1894.



after the volunteer armies by disbandment ceased to exist. 50, 192-203, *November, 1891*; Card 494, *October, 1894*. If the party was in fact discharged, actually or constructively, before or at the time the volunteer forces were disbanded, as shown by the records, a certificate to that effect could at any time be given by the War Department. 36, 334, *November, 1889*.

1161. The statutes requiring honorable discharge from the military service to entitle the party discharged to certain rights and privileges have reference to the discharge given him for the purpose of severing him from the service—the only regular legal discharge. *Held* therefore that a discharge certificate given (without authority of statute) to a volunteer soldier (who had never been discharged), after the volunteer armies had ceased to exist, “to complete his military record”, was void and of no effect. He could not be discharged from a service he no longer belonged to nor from a service that no longer existed. 42, 267, *August, 1890*; 60, 214, *June, 1893*.

1162. A soldier who became insane while in the service was in hospital on account of the insanity at the expiration of his term of service. A discharge certificate was thereupon issued to him (in contravention of the Army Regulations covering such cases) and his discharge was noted on the records. *Held* that, being insane, his notice of discharge was ineffective to deprive him of the right to be sent to the Government Hospital for the Insane or to preclude the Government from recalling and cancelling the discharge. *Advised* that the same be recalled and cancelled, and the man committed to the Government Hospital in accordance with the regulations. 61, 79, *August, 1893*.

1163. There is no express statutory authority for sending to the Government Hospital for the Insane prisoners at military posts who have been discharged the service and pending their confinement have become insane; but it is the practice to send them there.<sup>1</sup> Cards 443, *October, 1894*; 4102, *May, 1898*.

1164. A dishonorable discharge is a discharge given pursuant to the sentence of a general court-martial when specifically awarded by or necessarily involved in such sentence. 42, 267, *August, 1890*. Being a punishment it can only be authorized by sentence of a court-martial after trial and conviction, and no executive or military official (except in executing such a sentence) can legally give or order such discharge. 36, 334, *November, 1889*; 56, 220, *October, 1892*; 60, 95, *June, 1893*. The sentence “To be drummed out of the service,” necessarily involves dishonorable discharge and it has been the practice to give certificates thereof in such cases. 41, 117, *May, 1890*. And when a soldier is

<sup>1</sup> See Sec. 4852, R. S., as to prisoners becoming insane in the U. S. penitentiary.

sentenced by court-martial to imprisonment in a penitentiary and the sentence does not also direct dishonorable discharge, it nevertheless involves such discharge.<sup>1</sup> Card, 1226, *April, 1895*.

1165. Also *held*, that a military commission can adjudge dishonorable discharge from the military service, if it has jurisdiction of the offence committed by the soldier, and such punishment is necessary to a full and proper exercise of its jurisdiction. \*41, 18, *May, 1890*; 60, 164, *June, 1893*.

1166. An honorable discharge releases from and marks the termination of the particular contract and term of enlistment to which it relates only, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment. 49, 442, *October, 1891*; 53, 179, *April, 1892*; 59, 86, *April, 1893*. Similarly *held* with respect to a discharge without honor. Card 2115, *March, 1896*. These discharges release the soldier from amenability for all offences charged against him within the particular term to which they relate, including that of desertion, except as provided in the 60th Article of War. Card 2041, *May, 1896*.

1167. But a dishonorable discharge (*i. e.* by sentence) does not relate to any particular contract or term of enlistment; it is a discharge from the military service as a punishment—a complete expulsion from the army and covers all unexpired enlistments. A soldier thus dishonorably discharged *cannot* be made amenable for a desertion or other military offence committed under a prior enlistment except as provided in the 60th Article of War. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offences. 53, 46, 179, *April, 1892*; 55, 165, *August, 1892*; 59, 55, *April, 1893*; Card 3585, *November, 1897*.

1168. A soldier dishonorably discharged loses his retained pay, if any, under Section 1281, Revised Statutes (see par. 1369, A. R. of 1895), and his travel allowances under Section 1290, Revised Statutes. 17, 203, *June, 1887*.

1169. A soldier who had been tried and convicted numerous times by court-martial during his term of service was at the expiration thereof given a certificate of discharge "without honor", for, as stated by his company commander, "being disqualified for service on account of *character* through his own fault." *Held*, that the condition referred to under which a soldier may be discharged without honor, to wit, "when he is discharged without trial on account of having become disqualified for service, physically or in character, through his own

<sup>1</sup>This was the practice during the civil war. But it is now the practice in such cases to specifically adjudge dishonorable discharge to precede the imprisonment.

fault", did not apply to the case of a soldier discharged by reason of expiration of term of service; that the previous convictions could properly have been considered by the board of officers provided for by the regulations in determining whether the soldier's service had been honest and faithful and upon an approved finding that it had not been, the discharge without honor could have been given. 65, 40, *May, 1894*.

1170. Section 4 of the act of June 16, 1890, c. 426, authorizes the President, in time of peace, in his discretion and under such rules and upon such conditions as he shall prescribe "to permit any enlisted man to purchase his discharge from the army." *Held*, that under this section the President could permit a soldier to purchase his discharge, even if his service had not been honest and faithful, but in such event the soldier would forfeit his retained pay, if any. 63, 373, *February, 1894*.

1171. Discharges are granted under the provisions of paragraphs 144, 145, 146, A. R. of 1895 (155-157 of 1901), by way of favor, upon the application of the soldiers eligible therefor and subject in each case to a waiver of travel allowances (par. 146). *Held* that this waiver could legally be required; and that the soldier by applying for the discharge consents to such waiver as a condition upon which the discharge will be granted. Card 1862, *December, 1895*. As the discharge can only be granted by the President or Secretary of War, a department commander has no authority to refuse to forward an application therefor. Card 203, *August, 1894*.

1172. *Held* that under paragraphs 2 and 4, G. O. 17, A. G. O., 1893 (A. R. 144 of 1895; 155 of 1901), the period during which application for discharge by purchase may be made is limited to the second year and first half of the third year of the enlistment therein referred to; but the order for such discharge may be issued and the discharge executed subsequently to the termination of such period. Cards 247, *July, 1894*; 1340, *May, 1895*.

1173. Sec. 4 of the act of June 16, 1890, provides that moneys paid upon purchase of discharges shall be "deposited in the Treasury to the credit of one or more of the current appropriations for the support of the army, to be indicated by the Secretary of War." *Held* that under this section the Secretary could change his designation of appropriations from time to time, as to purchase money thereafter accruing, if, in his judgment, such change would be for the interests of the service. 59, 60, *April, 1893*.

1174. *Held* that there was no legal authority for the *refunding*, by the military authorities, of money paid to purchase a discharge under the act of June 16, 1890. This clearly appears from the terms of the

act which provides that the money when paid, "shall be deposited in the Treasury" to the credit of some current appropriation to be designated by the Secretary of War, to be "available for the payment of expenses incurred during the fiscal year in which the discharge is made." The act moreover authorizes the President to permit such purchases "under such rules and upon such conditions as he shall prescribe", and nothing is found in the rules actually prescribed (G. O. 81, 108, of 1890; 48 of 1891; 32 of 1892; or 17 of 1893) which contemplates or refers to the refunding of such purchase money. **65, 71, May, 1894.**

**1175.** Where a soldier deposited fifty dollars under the act of May 15, 1872, presumably in anticipation of his application for purchase of discharge, and subsequently while such application was pending deserted, *held* that said deposit was necessarily unconditional and like any other deposit was forfeited by desertion. Card 807, *January, 1895.*

**1176.** Under the authority of the act of April 14, 1890, c. 80, entitled "an Act for the relief of soldiers and sailors who enlisted or served under assumed names \* \* \* during the war of the rebellion",—*held* that a son of a slave, originally enlisted under the name of his former master and discharged as such in 1864, might legally have a discharge certificate issued to him in the name of his father, become free since the enlistment. **60, 354, July, 1893.**

**1177.** Sec. 224, Rev. Sts., does not authorize the Secretary of War to issue a duplicate certificate of discharge, to replace one lost, to an officer or soldier who served in the Mexican war, or to one who served in any war other than "the late war against the rebellion." **65, 390, July, 1894.**

**1178.** Where a duplicate certificate, having been furnished, has been lost or destroyed, *held* that as the statute does not prohibit the issuing of a second certificate, the Secretary of War may, under the power which, as representative of the President is vested in him, issue such second certificate if in his judgment it is proper to do so. Card 3101, *April, 1897.*

**1179.** Where a certificate of honorable discharge upon being submitted to the Adjutant General's Office has had its value impaired by an erroneous entry thereon, *held* that there was no legal objection to an issue by the War Department of a new certificate containing no reference to the erroneous entry. **34, 222, August, 1889; Card 1793, October, 1895.**

**1180.** It is well established that a soldier cannot himself avoid his contract of enlistment on the ground of minority, and abandon at pleasure the military service. His release on this ground can be



obtained only on application of a parent or guardian entitled to his services, and without whose consent he enlisted.<sup>1</sup> 58, 142, *February, 1893*. The application of the parent, whether made to the Secretary of War, or on *habeas corpus* to a U. S. court, must be made before the soldier attains his majority and ratifies his contract.<sup>2</sup> LV, 440, *March, 1888*; 53, 105, *April, 1891*; 54, 233, *July, 1892*.

1181. Where a soldier otherwise eligible for discharge on the ground of minority at enlistment is held awaiting trial or sentence for desertion or other military offence, or under sentence for the same, an application for his discharge by his parent should not be entertained by the Secretary of War. In such a case the public interests are paramount to the right of the parent. Nor can the parent legally procure his release on *habeas corpus*.<sup>3</sup> L, 680, *August, 1886*; 54, 233, *July, 1892*; 57, 135, *December, 1892*; 61, 158, *August, 1893*; 62, 191, *November, 1893*; Cards 2870, *January, 1897*; 4244, *June, 1898*.

1182. A minor who enlists without the consent of his parent or guardian and procures his enlistment by intentionally concealing the fact that he is a minor, receiving pay and allowances thereunder, may be discharged without honor or held for trial for fraudulent enlistment, or honorably discharged, in the discretion of the Secretary of War. Card 4214, *June, 1898*.

1183. Where a State court on *habeas corpus* proceedings ordered that a soldier in the military service of the United States be discharged therefrom, *held* that as the court was without jurisdiction in the matter its order was absolutely void and without effect as a discharge of the soldier from the service. 32, 313-319, *May, 1889*; Card 394, *September, 1894*.

1184. *Held* that the Secretary of War can not delegate to department commanders the power conferred upon him by the act of March 16, 1896 (29 Stats., 63; G. O. 12, A. G. O., 1896), to discharge enlisted men for disability caused by their own misconduct, with forfeiture of travel allowances.<sup>4</sup> Card 7442, *December, 1899*.

<sup>1</sup> *In re Davison*, 21 Fed. Rep., 618; *In re Zimmerman*, 30 *id.*, 176; *In re Cosenow*, 37 *id.*, 608; *In re Kaufman*, 41 *id.*, 873; *In re Morrissey*, 137 U. S., 157.

<sup>2</sup> *In re Dohrendorf*, 40 Fed. Rep., 148; *In re Spence*, *id.*, 149.

<sup>3</sup> In a recent case, *In re Carver*, 103 Fed. Rep., 624, it was held that the Federal courts will entertain jurisdiction on *habeas corpus* for the release of a minor, under the age of 21, who is detained in the military service of the United States under enlistment, in violation of Sec. 1117, Rev. Sts., although charges have been filed against the minor by an officer of the army for violation of the act of July 27, 1892, sec. 3, making fraudulent enlistment and the receipt of pay or allowance thereunder punishable by court-martial, if the charges have not been acted upon by the Executive department of the Government.

But what constitutes action on the charges by the Executive department of the Government does not appear to have been argued or specially passed upon in this case.

See, for a citation and discussion of authorities on this subject, G. O. 127, A. G. O., 1900.

<sup>4</sup> But see G. O. 12, A. G. O., 1900 (A. R., 151 of 1901).



1185. The act of April 22, 1898, provided that "at the end of any war in which the United States may become involved the army shall be reduced to a peace basis by the \* \* \* honorable discharge or transfer of supernumerary enlisted men." *Held* that particular enlisted men could not claim a right under this law to be discharged. The provision is directed to the President and makes it his duty to reduce the army by the means indicated, and of course he, through the officers of the army, will select the men to be discharged. Card 5085, *October, 1898*. This act further provided that all enlistments for the volunteer army should be for the term of two years unless sooner terminated and that all officers and men composing said army should be discharged when the purposes for which they were called into service shall have been accomplished or on the conclusion of hostilities. *Held* that this latter provision made it the duty of the President to disband the volunteer army when the occurrences named took place, but did not give individuals the right to claim discharges before the end of the two years for which they enlisted. Cards 4822, *August, 1898*; 4891, 4897, *September, 1898*.

1186. G. O. 40, A. G. O. of 1898, provided "that men enlisted or reenlisted during the war may be informed that they will be granted their discharges if desired at the close of the war upon their individual applications." *Held* that this order simply authorized the discharge on their own application of men who had enlisted during the war, leaving the character of each discharge and the question of travel pay to be determined by the law and regulations on the subject. Card 6569, *June, 1899*.

1187. *Held*, that the provisions of par. 148, A. R. (162 of 1901), relating to the appointment of a board of officers to determine the facts in any case in which a soldier considers that injustice will be done him as to the character proposed to be given him on his discharge is directory only and does not affect the validity of an executed discharge, with reference to which the directions of the regulations have not been observed. Card 5943, *March, 1899*.

1188. By the practice of the War Department, the age of an alleged minor is generally required to be shown by the affidavits of both parents, if living, or by the affidavit of the surviving parent or guardian, supported by the affidavits of at least two other respectable persons cognizant of the fact or by an officially authenticated record of a church or court. If practicable the affidavits should be accompanied by the certificate of a judge of a U. S. or State court acquainted with the parties and vouching for the truth of the representations made. LIII, 53, *October, 1896*.

1189. *Advised* that an application of a parent for the discharge of a

minor soldier be denied where it appeared that he had been married, presumably with the parent's consent. By the laws of France, and of Louisiana and some other States, marriage is an emancipation. And if it does not wholly emancipate the minor, it removes him in a measure from the parent's control and gives him a right to his earnings.<sup>1</sup> 53, 105, *April, 1892*.

1190. A parent or guardian not domiciled in the United States but in France, *held* not entitled to the discharge from the military service of a minor enlisted without consent. By such foreign residence the parent or guardian is viewed as having emancipated the child or ward.<sup>2</sup> 62, 132, *October, 1893*.

1191. Where an application was made for the discharge, on account of minority, of a soldier born in Bermuda, *advised* that, in addition to the affidavit of the parent, there be required, as evidence of age, a transcript of the official parish, or other public, register of births, signed by the proper custodian (and sealed if he has a seal); his signature to be certified to as genuine by the U. S. consul. A transcript from the parish record of baptisms (as sent in this case), *held* insufficient if a register of births exists. 43, 77, *September, 1890*.

#### DISCIPLINARY PUNISHMENT OR REPRESSION.

1192. Two soldiers, at a military post, refused to do extra fatigue duty imposed upon them by their captain for failing to make a proper score at target. The captain caused one of them to be tied up by his wrists with his feet partly raised from the ground for some six hours, and the other to be so tied up for about one hour and to be immersed several times in a water-hole. *Held* that such action was wholly without justification, the punishment inflicted not being sanctioned by law or usage, or warranted by the circumstances of the case, and that the officer was clearly amenable to trial under the 62d Article of War. 60, 257, *June, 1893*.

1193. A soldier, who had been improperly allowed with others of a detachment to enter a saloon and drink, became disorderly and insubordinate in public, without however committing violence. The captain commanding, in attempting to repress him, assaulted him by striking him on the head with a government rifle with such force as to fell him to the ground and render him senseless, at the same time inflicting a severe contused lacerated wound on his right ear which rendered it deaf for several days. There was nothing like a mutiny and no serious disorder in the command. *Held* that the violence of the officer was

<sup>1</sup> See *Taunton v. Plymouth*, 15 Mass., 204.

<sup>2</sup> So held by Attorney-General Cushing, 6 Opns., 607.

greatly in excess of his authority and wholly unjustifiable, the fact that the soldier was under the influence of liquor going to aggravate the officer's offence. And recommended that the captain be brought to trial under Art. 62. 43, 52, *June, 1855*.

1194. Where, upon the trial of a soldier convicted of insubordinate conduct and severely sentenced, it was shown in evidence that at the time of such conduct he was subjected to punitive treatment by his company commander, who caused him to be tied up and gagged, and it appeared that there was no indication of mutiny or other exigency in the command, *held* that such treatment was arbitrary and unwarranted by law or usage, and a military offence on the part of the officer, and *advised* that clemency be exercised in the case of the soldier. LIII, 193, *October, 1886*.

1195. *Recommended* that company commanders be authorized, subject to the control of the commanding officer of the post, to dispose of derelictions of duty in their commands which would be within the jurisdiction of inferior courts martial, by requiring extra tours of company, troop or battery fatigue, unless the soldier concerned demands a trial; the right to make such demand to be made known to him.<sup>1</sup> Card 3589, *October, 1897*.

#### DISMISSAL—BY SENTENCE.

1196. Courts martial are empowered (and required) to adjudge dismissal upon officers of the army by the 3d, 6th, 8th, 13th, 14th, 15th, 18th, 26th, 27th, 28th, 38th, 50th, 54th, 59th, 61st and 65th Articles of War, upon conviction of the specific offences therein described. In Arts. 8 and 50 the punishment of dismissal is referred to as "cashiering"—a term which has almost passed out of use in our service, and when employed means no more than dismissal. VII, 601, *June, 1864*; XXXIV, 563, *October, 1873*.

1197. A legal sentence of dismissal of an officer when finally confirmed by the competent authorities (according to the 106th or 109th Article of War) takes effect upon the officer on the day on which the confirmation is officially communicated to him, either by the promulgation of the order of confirmation at his station or other form of official notice.<sup>2</sup> Thus the date of the actual confirmation is not necessarily—is not probably in the majority of cases—the date on which the dismissal goes into effect. The declaration is indeed sometimes added in the order of confirmation, that the party ceases thereupon to be an officer of the army; but this declaration is immaterial and sur-

<sup>1</sup> See this recommendation adopted and published in par. 1, Circular 5, A. G. O., 1898.

<sup>2</sup> See §§ 1848 and 1849, *post*.

plusage. It not unfrequently happens—especially in time of war, and particularly when the officer has, since his trial, been taken prisoner by the enemy—that a considerable period may elapse before the officer is officially informed of the confirmation of the sentence and thus becomes, in law and fact, dismissed from the service. XXXVI, 110, *December, 1874*; XXXVIII, 341, *October, 1876*; 40, 176, *September, 1891*.

1198. A sentence of dismissal cannot legally be confirmed so as to take effect as of a date prior to that of the formal confirmation. Thus where such a sentence was adjudged by a court martial on April 27, 1863, but owing to the exigencies of the service was not acted upon till after several months by the reviewing authority, who then formally confirmed the sentence, adding in the order that the officer "ceases to be an officer of the army from April 27, 1863," *held* that this part of the order was unauthorized and inoperative. XXX, 480, *July, 1870*; 42, 370, *August, 1890*.

1199. When a legal sentence of dismissal has been duly *confirmed and executed*, the power over the case of the reviewing officer (whether the President, or the commanding general in time of war—see REVIEWING OFFICER) is *exhausted*. The reviewing authority, as such, is *functus officio*. He cannot recall, revoke, rescind or modify the official act of confirmation, or the order which is the evidence of it. So—the sentence being executed and the dismissal being an accomplished fact—the case is beyond the reach of the *pardoning power*: by no exercise of that power can the sentence be removed or remitted, or the office lost be restored.<sup>1</sup> Thus, so far as the executive power is concerned, the dismissal is final and irreversible. And the law has provided no court of appeal or other revisory authority (see APPEAL) by which the same may be reopened or set aside: the only remedy is by a new appointment.<sup>2</sup>

Of course if the sentence was not *legal*—if the court, for example, was illegally constituted or composed, or was without jurisdiction, or its proceedings were invalidated as by some such fatal defect as that less than five members took part in the judgment—there has of course been no dismissal in law, and this *fact* may at any time be declared in orders. And so, where the sentence, though legal, has not been approved or confirmed by the competent authority. But where the sentence is strictly legal and has been legally confirmed and executed, the mere fact either that the proceedings of the court were irregular, or that the rights of the accused were prejudiced in the admission or rejection of evidence, or that from this cause or because the members

<sup>1</sup> *Ex parte Garland*, 4 Wallace, 333, 381, 12 Opins. At. Gen., 548.

<sup>2</sup> See 4 Opins. At. Gen., 274, 306; 6 *id.*, 309, 514; 7 *id.*, 360; 12 *id.*, 548; 14 *id.*, 449.



of the court were biased or otherwise, the finding was unjust or the sentence too severe—can add nothing whatever to the power of the Executive or of Congress to nullify or modify the dismissal *as such*.<sup>1</sup> XX, 302, *January, 1865*; XXVI, 462, *February, 1868*; XXVIII, 457, *March, 1869*; XXIX, 575, *January, 1870*; XXX, 318, 323, 420, *May and June, 1870*; XXXIV, 634, *November, 1874*; XXXVI, 274, 330, *February and March, 1875*; XXXVIII, 243, *August, 1876*; XXXIX, 238, 242, 248, *May and June, 1879*; LIII, 498, *September, 1887*; LV, 221, *December, 1887*; Card 7509, *January, 1900*.

1200. Upon the legal execution of a sentence of dismissal, the officer is wholly separated from the military service and becomes as completely a *civilian* as if he had never been in the army. As his dismissal is irreversible, he can be restored to the service only by a new appointment by the President under the Constitution.<sup>2</sup> This is the law independently of express legislation. In July, 1868, however, Congress enacted a statute described in its title as "declaratory of the law" on the subject, which, as now incorporated in Sec. 1228, Rev. Sts., provides that—"No officer of the Army who has been or may be dismissed from the service by the sentence of a general court martial, formally approved by the proper reviewing authority, shall ever be restored to the military service except by a reappointment confirmed by the Senate." Thus, upon principle and at law, a new appointment is the only mode by which a dismissed officer can be rehabilitated. He cannot be honorably discharged (as dismissed officers have not unfrequently asked to be) or placed on the retired list or permitted to resign, in lieu of standing dismissed, because it is only a commissioned officer of the army who can be thus privileged, and, being a *civilian*, he would necessarily, in order to be enabled to be discharged, or to resign, &c., from the army, have first to be returned to it by an appointment. XXIX, 108, *July, 1869*; XXX, 318, 323, *May, 1870*; XXXI, 504, *July, 1871*; XXXVI, 216, 330, *January and March, 1875*; XXXVII, 421, 492, *March and April, 1876*; XXXIX, 248, *October, 1877*; XLII, 675, *September, 1879*.

1201. A sentence of dismissal does not attach any legal *disability* to the person dismissed. He is not, as is indeed indicated by Sec. 1228, Rev. Sts., above cited, disqualified to be newly appointed to the army (XXXVI, 330, *March, 1875*), nor is he disqualified to be enlisted as a soldier (VII, 253, *February, 1864*), or to hold civil office under the United States. VIII, 601, *June, 1864*; XXII, 517, *December, 1866*; XXXI, 486, *June, 1871*; 39, 95, *January, 1890*; 40, 14, *March, 1890*.

<sup>1</sup> See 4 Opins. At. Gen., 274.

<sup>2</sup> See 4 Opins. At. Gen., 318; 14 *id.*, 448, 502; also Report 868 of Judiciary Committee of Senate, of March 3, 1879, 45th Cong., 3d Sess.



**1202.** In view of the positive provision of the act of July 16, 1862, now incorporated in Sec. 1441, Rev. Sts., that "no officer of the navy who has been dismissed by the sentence of a court martial \* \* \* shall ever again become an officer of the navy," *held*, in the case of an assistant engineer of the navy, thus dismissed, and whose sentence had been approved by the President, that an order assuming to "reinstate" him, by means of the "revocation" of such approval, would be in contravention of the statute and beyond the power of the Executive. V, 481, *December, 1863*.

#### DISMISSAL BY ORDER OF THE PRESIDENT.

**1203.** Dismissal by executive order is quite distinct from dismissal by sentence. The latter is a *punishment*; the former is *removal from office*.<sup>1</sup> The power to dismiss, which, as being an incident to the power to appoint public officers, had been regarded since 1789 as vested in the President by the Constitution,<sup>2</sup> was, for the first time in 1866 (by the act of July 13th of that year, re-enacted in the second clause of the present 99th Article of War and in Sec. 1229, Rev. Sts.), expressly divested by Congress in so far as respects its exercise in time of peace.<sup>3</sup> By the statute law it is now authorized only in time of war. During the war of the rebellion it was exercised in a great number of cases, sometimes for the purpose of summarily ridding the service of unworthy officers, sometimes in the form of a discharge or muster-out of officers, whose services were simply no longer required. The distinction between this species of dismissal and dismissal by sentence is illustrated by the fact that the former has, with the sanction of legal authority, been repeatedly ordered in cases where a court-martial has previously acquitted the officer of the very offences on account of which the summary action has been resorted to.<sup>4</sup> XXIII, 265, *October, 1866*; XXVI, 5, *September, 1867*; XXXI, 557, *August, 1871*; XLII, 470, *July, 1880*; XLVIII, 243, *January, 1884*.

**1204.** A summary dismissal of an officer does not properly take effect until the order of dismissal or an official copy of the same is delivered to him, or he is otherwise officially notified of the *fact* of the dismissal.<sup>5</sup> 49, 91, 176, *September, 1891*.

**1206.** A summary dismissal "by order of the Secretary of War" is

<sup>1</sup> See 7 Opins. At. Gen., 251.

<sup>2</sup> See, as among the principal authorities on this subject, -*Commonwealth v. Busnier*, 5 Sergt. & Rawle, 461; *Ex parte Hennen*, 13 Peters, 258, 259; *United States v. Guthrie*, 17 Howard, 307; 4 Opins. At. Gen., 1, 609-613; 6 *id.*, 6-8; 7 *id.*, 251, 8 *id.*, 230-232; 12 *id.*, 424-426; *Sergeant*, Const. Law, 373; 2 *Story's Cons.* § 1537, note 1; *Kent's Cons.*, 310; 2 *Marshall's Washington*, 162.

<sup>3</sup> See 16 Opins. At. Gen., 315.

<sup>4</sup> See 12 Opins. At. Gen., 427.

<sup>5</sup> *Gould v. U. S.*, 19 Ct. Cls. 503, 505; 4 Comp. Dec. 601; 5 *id.*, 419.

in law the act of the President.<sup>1</sup> V, 319, *November, 1864*; 36, 322, *November, 1889*.

**1206.** A department or army commander can have of course no authority to summarily dismiss or discharge an officer from the military service. XI, 405, *February, 1865*; XVI, 553, *September, 1865*; XLI, 84, *January, 1878*; XLII, 263, *April, 1879*. But where, in a case of a regular officer, this authority was in fact exercised, and the President, treating his office as vacant, proceeded to fill the vacancy by a new appointment, *held* that he had made the dismissal his own act and legalized the same.<sup>2</sup> XLI, 84, *January, 1878*. So where (in 1863) an officer of volunteers was dismissed by the order of an army commander, which was never ratified in terms by the President, but a successor, appointed to the vacancy by the governor of the State, was accepted and mustered in by the United States; *held* (in 1880) that the dismissal was to be regarded as having been substantially ratified and legalized. XLIV, 82, *July, 1880*.

There was during the civil war no law or regulation specifically authorizing department or army commanders to dismiss commissioned officers without trial by court-martial, but such dismissals were made sometimes unconditionally and sometimes subject to approval of higher authority, and the War Department has in practice held that it is without power to change the record or status of persons so dismissed. Card 3728, *December, 1897*.

**1207.** *Held* that the ruling in Blake's case (103 U. S., 231) was applicable, and that the office of an army officer might legally be vacated by the appointment and commission of a successor, although between the office of the original officer and that of the successor there may have intervened a tenure by a third officer. Thus—(1st) Captain A. was dismissed from his office without legal authority; (2d) Captain B., an unassigned officer, was assigned to the captaincy of A. and held it till his own resignation, one year and three months later; (3d) Lieutenant C. was then promoted and appointed to the office and his appointment was confirmed. *Held* that Lieutenant C. was the legal incumbent of the office. LV, 546, *April, 1888*.

**1208.** *Held* that the ruling of the Supreme Court in the case of Blake was not applicable to volunteer officers of State organizations, and that a governor of a State, who had duly appointed a certain volunteer officer in a regiment, was not empowered to dismiss him by simply appointing to the same office, commissioning, and causing to be mustered into the U. S. service, another person. 46, 102, *March, 1891*.

<sup>1</sup> See 12 Opins. At. Gen., 421, McElrath v. United States, 12 Cl. Cl. R., 202, also § 2794, *post*, and note.

<sup>2</sup> See § 337, *ante*, and note.

**1209.** Where the successors of eighty-two volunteer officers of the civil war, sentenced to be dismissed, were, pending action on their cases by the President, appointed, with the advice and consent of the Senate, it was held, that the latter under the ruling in the Blake case ceased to be officers of the army after such appointments were made: and this independently of the fact that the court-martial proceedings had never actually been approved or confirmed in whole or in part by the President as required by the Articles of War to give effect to the sentences of dismissal. **24.** 7, *April, 1888.*

**1210.** Where, by the direction of the President, an order was issued cancelling the muster-in of a volunteer officer on account of facts indicating that he was not a fit person to hold a commission, *held* that this was, in effect, a legal exercise of the authority of summary dismissal for cause, vested in the President by the act of July 17, 1862. **61.** 264, *August, 1893.*

The President had not the same power of dismissal in the case of a volunteer officer as he has in that of a regular officer. This for the reason that the tenure of office of the former is for a fixed term and for a limited time only: the power to dismiss is thus, in his case, not an incident of the appointing power.<sup>1</sup> But the President was invested with a special power of dismissal of volunteer officers by the act of Congress of July 17, 1862. **48.** 102, *March, 1891*; **52.** 496, *March, 1892.*

**1211.** *Held* that it could not affect the operation of an order summarily dismissing an officer as "second lieutenant," that, before its being communicated to him by being promulgated to the regiment, he had become by promotion a first lieutenant. **VI.** 558, *November, 1864.*

**1212.** A dismissal of an officer by executive order does not operate to disqualify him for reappointment to military office, or for appointment to civil office under the United States. **XXXVI.** 330, *March, 1875.*

**1213.** The Executive, in summarily dismissing an officer, cannot at the same time deprive him of pay due. Nor can the right of an officer to his pay for any period prior to a summary dismissal ordered in his case, be divested by a dating back of the order of dismissal. Such an order cannot be made to relate back so as to affect the status or rights of the officer as they existed before the date of the taking effect of the dismissal. **VI.** 379, 405, *September and October, 1864*; **X.** 1, 4, *July, 1864*; **XVII.** 670, *May, 1866*; **XXXI.** 125, *January, 1871*; **XXXV.** 112, *January 1874*; **XLIH.** 73, *December, 1878*; 470, *July, 1880.*

<sup>1</sup> See Mechem on Public Officers, p. 283, § 445. But see Parson's case, 30 Ct. Cl., 272.

**1214.** There can be no *revocation* of a duly executed order of dismissal, however unmerited or injudicious the original act may be deemed to have been. For distinct as dismissal by order is, in its nature, from dismissal by sentence (see § 1203 *ante*), the effect of the proceeding in divesting the office is the same in each case. An officer dismissed by an order, though his dismissal may have involved no disgrace, is assimilated to an officer dismissed by sentence in so far that he is completely relegated to a civil status, having in law no nearer or other relation to the military service than has any civilian who has never been in the army. Thus an order assuming to revoke a legal order of dismissal is as unauthorized as it is ineffectual. The original dismissal is an act done which cannot be undone, and the order, which is the evidence of it, is therefore incapable of revocation or recall.<sup>1</sup> Nor can that be affected indirectly which cannot legally be done directly. An officer dismissed by executive order cannot be relieved by being allowed to resign or be retired, or by being granted an honorable discharge. For, in order to be discharged, &c., from the army, he must first be *in* the army, and there is but one mode by which an officer once legally separated from the army can be put into it, viz: by a new appointment according to the Constitution.<sup>2</sup> XXXI, 504, *July, 1871*; XXXV, 392, 466, *May and July, 1874*; XXXVI, 216, 330, *January and March, 1875*; XXXVII, 451, *April, 1876*; XXXVIII, 61, 159, *January and July, 1876*; XXXIX, 248, *October, 1877*; 474, *March, 1878*; XLI, 153, *March, 1878*; 611, *July, 1879*; XLII, 73, *December 1878*; 35, 251, *September, 1889*; 36, 323, *November, 1889*; 52, 384, *March, 1892*; 59, 80, *April, 1893*; 65, 51, *May, 1894*; Card 4953, *September, 1898*.

**1215.** That a summary dismissal is not revocable by an executive order is established law. Cards 691, *December, 1894*; 3735, *March, 1898*; 4586, *July, 1898*. Where an officer duly summarily dismissed in July, 1863, and subsequently restored by an order assuming to revoke the order of dismissal, procured to be passed by Congress, in 1890, an act recognizing his restoration as legal, which, however, was vetoed by the President—*held* that his status was that of a person who had been illegally in the military service since the date of the order of so-called revocation. 44, 120, *December, 1890*.

**1216.** While an order assuming to revoke an executed legal order or sentence of dismissal is void and inoperative, yet where such dismissed

<sup>1</sup> See 4 Opins. At. Gen., 124; 12 *id.*, 424-8; 14 *id.*, 520; 15 *id.*, 658. A contrary view expressed by the Court of Claims, in its earlier period, in a series of cases—see *Smith v. United States*, 2 Ct. Cl., 206; *Winters v. United States*, 3 *id.*, 136; *Barnes v. United States*, 4 *id.*, 216; *Montgomery v. United States*, 5 *id.*, 93—was finally practically abandoned in *McElrath v. United States*, 12 *id.*, 201. See also *U. S. v. Carson*, 114 F. S., 619.

<sup>2</sup> See 5 Opins. At. Gen., 235; 12 *id.*, 421, 13 *id.*, 5; *McElrath v. United States*, 12 Ct. Cl., 201. Compare § 1206, *ante*, and §§ 1218-1224, *post*.



officer enters upon the duties of the office under the void order. *held* that he was during the period he thus performed such duties a *de facto* officer. Card 691, *December, 1894*; 3735, *March, 1898*.

1217. *Held* that it was quite evidently the intention of Congress in the act of July 15, 1870, s. 12, that the commissions held by the officers who remained unassigned on January 1, 1871, should cease on that day. No action on the part of a mustering officer was required to carry the law into effect—as is shown by G. O. 1 of January 2, 1871, in which the separation from the service, on January 1, of the unassigned officers was formally announced. 55, 104, *August, 1892*.

#### DISMISSAL—BY ORDER: TRIAL IN CASE OF.

1218. *Held* that the provision on this subject of the act of March 3, 1865, c. 79, s. 12<sup>1</sup> (now Sec. 1230, Rev. Sts.) referring as it does to officers "hereafter dismissed" was not retroactive in its operation, and did not embrace cases of officers dismissed by order before the date of its passage. XVI, 631, *October, 1865*; XX, 518, *April, 1866*. And similarly *held* as to the provision now incorporated in Sec. 1230, Rev. Sts.; the same, though somewhat differently worded from the original statute, being construed as not intended to enlarge the application of the latter.<sup>2</sup> XXXVII, 618, *June, 1876*; XXXVIII, 160, *July, 1876*.

1219. The statute does not indicate within what period after the dismissal the application for a trial should be made. It can only be said that, in preferring it, due diligence should be exercised—that it should be presented within a reasonable time.<sup>3</sup> XVI, 170, *May, 1865*; Card 4954, *January, 1899*. *Held* that a party who (without any sufficient excuse) delayed for nine years to apply for a trial under the statute might well be regarded as having waived his right thereto.<sup>4</sup> It could scarcely have been contemplated by Congress that a dismissed officer should be at liberty to defer his application for a trial till the evidence on which he was dismissed, or a material part of the same, had ceased to exist, and his restoration would thus be made certain. XLII, 446, *December, 1879*.

1220. Though it may be sufficient that the application made under the statute should state simply that the applicant has been "wrongfully" dismissed, the preferable form would be for the applicant to set forth in what the alleged wrong consisted. XVI, 513, *August, 1865*.

<sup>1</sup> This statute was held by the Attorney General (12 Opins., 4) not to be unconstitutional in that it was not "obnoxious to the objection that it invades or frustrates the power of the President to dismiss an officer." More serious objections to its constitutionality are believed to be: 1. That it authorizes the subjecting of a civilian to a military trial, 2, that in restoring an officer to the army it substitutes the action of a court martial for the appointing power of the President.

<sup>2</sup> See, to similar effect, the opinion of the Solicitor General in 16 Opins. At. Gen., 599.

<sup>3</sup> See *Newton v. U. S.*, 1849 (Os., 435), *Armstrong v. U. S.*, 26 *id.*, 387.

<sup>4</sup> Compare 4 Opins. At. Gen., 170; 5 *id.*, 384.



1221. Where a trial of a volunteer officer under this statute resulted in an acquittal, and his original dismissal thus became "void," but meanwhile his regiment had been mustered out of service, *held* that he was properly entitled to an honorable discharge as of the date of the muster out of the regiment with full pay and allowances up to that time. XII, 659, *September, 1865*.

1222. It has been repeatedly held and is well settled that with the passing away of the volunteer army of the civil war, each and every officer and enlisted man thereof became a civilian and lost his military status and all connection with the military establishment of the Government, and that laws relating alone to persons in the army are no longer applicable to him. *Held*, therefore, that officers dismissed by order of the President from such volunteer army can no longer legally be brought before a general court-martial for trial under Section 1230, Rev. Sts., *Card 4954, January, 1899*.

1223. Under the statute of 1865 there were but few trials; this legislation having been followed in the next year by the provision of the act of July 13, 1866 (now incorporated in the second clause of Sec. 1229, Rev. Sts., and the new 99th Article of War), prohibiting executive dismissals of officers of the army and navy in time of peace. Since the date of this act there have been no trials under the act of 1865; the later statute indeed would appear to have deprived the earlier one of all present application and effect. Thus *held*, that an officer dropped for desertion under the first clause of Sec. 1229, Rev. Sts., was not entitled, upon application therefor, to a trial under Sec. 1230; that the provision of the former section making such an officer ineligible for re-appointment in the army was incompatible with his restoration by the action of a court martial under the latter section; and that the latter section applied only to officers dismissed by order of the President under the general power to remove public officers appointed by him and frequently exercised in cases of army officers during the war of the rebellion (see § 1203, *ante*), but which, as to its exercise in time of *peace*, had been divested by Congress by the act of July 13, 1866. XLII, 446, *December, 1879*.

1224. Although the act provides that if the sentence of the court be not one of death or dismissal the party tried shall be restored to his office, yet *held*, in a case in which the court *acquitted* the accused, that the President possessed the authority, vested in reviewing officers in all other cases tried by court martial, of returning the proceedings to the court for revision (see *Revision*), and was therefore empowered to re-assemble the court for a reconsideration of the testimony, on the ground that the same did not, in his opinion, justify the acquittal. XIX, 191, *November, 1865*.

## DISQUALIFICATION.

**1225.** Disqualification, or incapacity to hold office under the United States, is a punishment certainly sanctioned by precedent in the military service.<sup>1</sup> Being a *continuing* punishment, it may of course be removed by a remission of the same by the pardoning power at any time during the life of the party. (See PARDON.) XXXI, 24, *November, 1870*; XLI, 158, *March, 1878*; XLII, 636, *May, 1880*.

<sup>1</sup> It is indeed specifically authorized in two articles of war, Nos. 6 and 14 (providing for the punishment of false muster and like offences), but is here apparently intended not as an independent punishment but as a penal consequence incident upon conviction and sentence of dismissal. As a distinctive punishment, however, it has been imposed in many cases, and has apparently been regarded as a particularly suitable penalty in cases of embezzlement of public funds or other fraud upon the Government.

Instances of sentences, including (generally with dismissal) the punishment of disqualification, are to be found in the following orders of the War Department (or Hdqrs. of Army), published before the civil war, the instances being none of them cases of conviction of false muster: G. O. of April 2, 1818; do. of 8 pt. 25, 1819; do. 71 of 1820; do. 15 of 1860. The infrequency of this punishment in the early orders may perhaps be owing in part to the fact that it was considered that "cashiering"—a sentence often then adjudged—involved disqualification. Similar instances of the same punishment occur in the following Orders issued from the War Department during and since the civil war: G. O. 18, 94, 159, 184, 242, 249, 332, 389, of 1863; do. 36, 51, 69, of 1864; G. C. M. O. 175, 251, 277, 369, 395, 404, of 1864; do. 6, 46, 85, 125, 201, 205, 219, 242, 238, 260, 270, 315, 365, 397, 452, 541, 565, 584, 602, 619, of 1865; do. 22, 68, 82, 89, 111, 161, 181, of 1866; do. 21, 52, 56, 62, 89, 91, 98, of 1867; do. 2, 58, of 1868; do. 44 of 1869; do. 14, 15, of 1870. Instances of this punishment have also been noted in the following orders issued from the military departments, *armies, &c.*: G. O. 60, 64, 76, 86, 89, 99, 106, of 1863; do. 2, 4, 20, 24, 28, 30, 32, 51, of 1864; do. 9, 12, of 1865—Army of the Potomac. G. O. 18, 81, of 1864; do. 11, of 1865—Dept. of the East. G. O. 81 of 1864—Dept. of Pennsylvania. G. O. 96 of 1864; do. 23, 27, of 1865—Middle Department. G. O. 22 of 1865—Middle Military Division. G. O. 15 of 1863; do. 30 of 1865—Dept. of West Virginia. G. O. 34, 113, 175, of 1864; do. 49, 82, of 1865—Dept. of Virginia and North Carolina. G. O. 32, 33, of 1864—Dept. of the Ohio. G. O. 19 of 1865—Dept. of Kentucky. G. O. 17, 21, 33, of 1863—Dept. of the Tennessee. G. O. 3 of 1863; do. 6, 22, of 1864—Dept. and Army of the Tennessee. G. O. 14 of 1865; do. 5 of 1866—Dept. of Tennessee. G. O. 21 of 1863; do. 24 of 1864; do. 77, 112, of 1865—Dept. of the Missouri. G. O. 8 of 1866—Dept. of Florida. G. O. 67 of 1863; do. 74, of 1865—Dept. of the Gulf. G. O. 55 of 1864—Mil. Div. of W. Mississippi. G. O. 87 of 1867—Second Mil. Dist. This punishment, however, has, since 1870, been discontinued in the practice of our courts martial, and this discontinuance is to be traced to the ruling of the Attorney General in an opinion addressed to the Secretary of the Navy in 1868 (12 Opus. 528), to the effect that a sentence of a *martial* court martial by which a contractor for naval supplies was excluded from future dealings for such supplies with the Government, was illegal, sentences of disability in general being further held to be "not in accordance with the custom of the service except where expressly authorized by law." This ruling was applied to a military case in G. C. M. O. 22 (as also in do. 57,) to War Dept., &c., of 1870, and the punishment of disqualification imposed upon an officer disapproved as unauthorized. But whatever may have been the usage of *martial* courts martial, the very numerous precedents of cases in which such punishment had been adjudged by *ordinary* courts for a great variety of offences, were it is considered, quite sufficient to have established that this penalty was sanctioned by custom in the army. In some instances the disqualification, as adjudged, has extended to the holding of public office in general; in others it has been confined to the holding of a military office. But, while the disqualification for *military* office is less objectionable than the more general form, it may well be doubted whether this species of punishment, inasmuch as it assumes in effect to inhibit the exercise by the Executive of the appointing power, is within the authority of a court martial. As will be perceived from the above, this punishment has been discontinued in our service, but on another and less tenable ground.

## DRAFT.

1226. It is evident from the provisions of the draft act of March 3, 1863, that in the first place the *enrolment* did not put men into the military service, but only established their liability to be called out. It is also evident that the *draft* did not put them into the military service, because fifty per cent more than the required quota were drafted and it was only intended that a part of the number drafted should be received into the service, and the means of determining the part were specifically provided. For the same reason the act of reporting at the rendezvous did not put them in, for those who were to go in were yet to be selected. On reporting, each one was to be carefully inspected by the surgeon of the board, who was to report his physical condition to the board and the board was to pass upon his case, and its decision was final. It was therefore the acceptance of a drafted man by the board of enrolment that put him in the service. No muster-in was necessary. Where the act speaks of the discharge of a drafted man rejected by the board, it evidently did not mean discharged from the military service; but a release from liability to service. Not being found fit for military service he was "discharged" from his liability to be called into service and sent home with his traveling expenses paid. The only obligation he could be discharged from before his acceptance was the obligation to do military service, if accepted, and when he was found to be disqualified and was rejected and discharged he was simply released from this obligation. It would not be reasonable to construe the word "discharged" to mean that a man was discharged from a service which he had not entered because on being examined he was found to be unfit for it and was therefore rejected and sent home. The provision that a drafted man who should fail to report at the rendezvous without furnishing a substitute or paying the commutation, should be deemed a deserter is not in conflict with these views. The object of this provision was to enforce the appearance of those notified and for this purpose it was prescribed that for a failure to appear they would be deemed deserters and liable to trial and punishment as such. 50, 313, *November, 1891*; Card 1570, *July, 1895*.

1227. Acceptance by the board of enrolment, like muster-in, converted the civilian into the soldier, and a drafted man so accepted should be regarded as having been in the military service of the United States until his separation therefrom by one of the incidents or casualties of the service. Card 2389, *August, 1896*.

1228. The object of a draft (and therefore the end or completion of the process of drafting) was under the act of March 3, 1863, to place the drafted person on general military duty as a soldier and whenever this was accomplished the person drafted passed beyond the control of

the draft officers. So long as the latter could accept or reject him, the process of drafting was not complete, and the person was not fully in the military service. Card 2085, *June, 1896*.

1229. A drafted man is not necessarily mustered into service. Examining him and holding him to service and actually putting him on duty may take the place of a formal "muster in." Card 2033, *February, 1896*.

1230. By section 13, of the enrollment act of March 3, 1863, a drafted man who failed to report to the board of enrollment was declared "a deserter" and triable therefor by court martial. *Held* that this section imposed upon him the single duty of reporting to the enrollment board, and to that extent and for that purpose only gave him a military status; that prior to his acceptance or rejection by the board, he was not fully in the military service of the United States, nor a soldier within the ordinary meaning of that term. Cards 2041, 2042, *May, 1896*.

1231. Substitutes were not usually formally mustered in, but were simply accepted by the board of enrollment in the same way that drafted men were. It was not necessary to muster in drafted men or their substitutes. A muster-in is a mere matter of formal acceptance of the man by the Government and is the usual method of formally accepting men who voluntarily enlist. But the draft act of 1863 provided a different method of accepting the men who were to be put into the service by means of its provisions, viz., acceptance by a board of enrollment. So *held* where a substitute had been duly accepted by such a board, that a subsequent formal muster-in should be treated as without legal effect and superfluous in determining the date of entry into service. Card 1570, *July, 1895*.

1232. The exemptions from the conscription in the late civil war are specifically set forth in sec. 2 of the original act of March 3, 1863, and sec. 10 of the amendatory act of February 10, 1864. The exempting provision of the later act in effect repeated and superseded that of the earlier act, so that a person exempted and not drafted under the act of 1863 may have been liable to draft under that of 1864. 64, 498, *May, 1894*.

#### DRUNKENNESS.

1233. While drunkenness is no excuse for crime,<sup>1</sup> and one who becomes voluntarily drunk is criminally responsible for all offences committed

<sup>1</sup> Coke, in laying down the doctrine, now general, that drunkenness does not extenuate but rather aggravates the offence actually committed, says: "It is a great offence in itself." *Beverly's case*, 4 Coke, 123 b. So—"The law will not suffer any man to privilege one crime by another." *Blackstone Com.*, v. 4, p. 26. "The vices of men cannot constitute an excuse for their crimes." Story J., in *United States v. Cornell*, 2 Mason, 91, 111. As to the offence of drunkenness in general, at military law, see §§ 43-54, *ante*.



by him while in such condition, yet the fact of the existence of drunkenness may be proper evidence to determine the question of the species or grade of crime actually committed, especially where the point to be decided is whether the accused was actuated by a certain specific *intent*. Thus the fact and measure of the drunkenness of the accused may properly be considered by the court as affecting the question of the existence of an *animus furandi* in a case of alleged larceny.<sup>1</sup> XXIII, 222, *August, 1866*; XXX, 337, *May, 1870*.

1234. Drunkenness caused by morphine or other drug (see THIRTY EIGHTH ARTICLE), prescribed by a medical officer of the army or civil physician, may constitute an excuse for a breach of discipline committed by an officer or soldier, provided it quite clearly appears that this was the sole cause of the offence committed, the accused not being chargeable with negligence or fault in the case. XXVIII, 390, *February, 1869*.

## E.

### EIGHT-HOUR LAW.

1235. The original statute on this subject—the act of June 25, 1868, incorporated in Sec. 3738, Rev. Sts.—merely provided that eight hours should “constitute a day’s work” for laborers, &c., employed by the United States. It has been held by the Supreme Court<sup>2</sup> (U. S. v. Martin, 94 U. S., 400), that this enactment was merely “a direction by the Government to its agents,” not “a contract between the Government and its laborers, that eight hours shall constitute a day’s work,” and that it did not “prevent the Government from making agreements with them by which their labor may be more (or less) than eight hours a day.” The act thus failed of its apparent object. To cure this defect the act of August 1, 1892, c. 352, was passed. *Held* therefore that the term “public works of the United States,” used in the first section of the later act, should not be narrowly construed. 55, 155, *August, 1892*; Card 5429, *December, 1898*.

<sup>1</sup> *Rex v. Pitman*, 2 C. & P. 423; 1 Bish. Cr. L. § 400. So, in fact the drunkenness has been held admissible in evidence in cases of *homicide*, upon the question of the existence of malice as distinguishing murder from manslaughter; as also upon the question of deliberate intent to kill in States where the law distinguishes degrees of murder. *State v. Johnson*, 40 Conn., 136, and 41 *id.*, 588; *People v. Rogers*, 18 N. York, 9; *People v. Hamnall*, 2 Parker, 223; *People v. Robinson*, *id.*, 235; *State v. McCants*, 1 Spears, 384; *Kelly v. State*, 3 Sm. & M., 518; *Shannahan v. Commonwealth*, 8 Bush, 463; *Swan v. State*, 4 Humph., 130; *Pirtle v. State*, 9 *id.*, 663; *Haile v. State*, 11 *id.*, 154; *People v. Belencia*, 21 Cal., 544; *People v. King*, 27 *id.*, 509; *People v. Williams*, 43 *id.*, 244; 3 Greenl. Ev. §§ 6, 148; 1 Bish. Cr. L. §§ 492, 493.

<sup>2</sup> And see 19 Opins. At. Gen., 685.



1236. Thus held that the construction of levees on the banks of the Mississippi river, in accordance with the plans of the Mississippi River Commission was a public work of the United States in the sense of the act of August 1, 1892, c. 352, s. 1, although the United States did not own the land. A proprietorship in or jurisdiction over the thing constructed is not necessary. The United States expends annually more than twenty millions for the improvement of rivers and harbors, but the greater part of this is done without acquiring title or jurisdiction to or over the premises. The question under the act is not in whom is the title or jurisdiction but who is doing the work. The construction of these levees is a particular work appropriated for by Congress and to be contracted for by the United States. It is therefore one of the "public works of the United States," and subject to the provisions of this statute. 55, 155, *August, 1892*.

1237. *Held* that it was not essential that the requirement of the act of August 1, 1892, be embodied in a contract, the law itself being self-acting. The responsibility rests on contractors to comply with it, irrespective of the terms and conditions of their contracts. The officers who enter into contracts on behalf of the United States are not charged with the duty of enforcing the law with reference to those with whom they contract; the latter being directly responsible in the matter. Any construction by the War Department of the requirements of the act would, if erroneous and not sustained by the courts, be no protection to contractors. 55, 311, *September, 1892*.

1238. Inquiry having been made of the War Department by certain contractors whether the men employed on dredges, scows and tugs on Lake Erie, under contracts with the United States, were to be regarded as excepted from the application of the act of 1892—*held* that it was not the duty or province of the War Department to determine such questions, but that the same were for the courts to decide, on trials, under the second section of the act, of persons charged with violations of its provisions. Neither the War or other Department of the Government can lay down rules, or make constructions of the law, for contractors, which would effectually protect them were they brought to trial. 57, 36, *December, 1892*.

1239. The term "extraordinary emergency," employed in the first section of the act of 1892, cannot properly be construed in advance as referring or applicable to any particular class of cases. The question whether there is or was such emergency should be left to be determined

<sup>1</sup>In a communication to the Secretary of War of August 29, 1892, the Attorney General, whose opinion had been asked with regard to the application in general of the act to the construction of levees on the Mississippi River, declines to give an official opinion with a view to the guidance of persons who may propose to enter into contract relations with the United States "in the absence of a special case requiring the action of the Secretary." See 20 Opins., 159.

by the facts of each special instance as it arises. A case in which it appeared that a compliance with the statute was not possible, might well be held to be one of "extraordinary emergency." 55, 311, *September, 1892*; 60, 263, *July, 1893*; Card 1365, *March, 1895*.

1240. No provision is contained in the act of 1892 for the *suspension* of its operation, and the Secretary of War has no power to suspend it as to certain work or places of work on the theory that an "emergency" exists as to the same. Nor can he lay down in advance any general rule as to what would be such an emergency as would relieve an officer or contractor from liability or give him an immunity from prosecution. The question of the existence of an emergency is to be determined, in the first instance, by the person carrying on, or in charge of, the work; in the second, by the court, if the case comes before one. It may be said generally that when the emergency can be foreseen it is not extraordinary; that increased expense and inconvenience cannot constitute an emergency when they can be foreseen and guarded against. 55, 153, 324, 386, 469, *August and September, 1892*; 56, 330, *November 1892*; Cards 1365, *March, 1895*; 9137, *October, 1900*.

1241. At the Leavenworth Military Prison there are employed certain civilians as "foremen of mechanics," who are paid, under the Sundry Civil Appropriation Act, a stated salary of \$1,200 *per annum*, and whose duty it is to direct the labor of the prisoners. The regulations framed for the government of the Military Prison, pursuant to Sec. 1345, Rev. Sts., require more than eight hours' labor *per diem* of the prisoners, and consequently more from these foremen. *Held* that the latter were not entitled to the benefits of the act of August 1, 1892, c. 352, as "laborers or mechanics," the statute not being applicable to them. 65, 220, *June, 1894*.

1242. The act of August 1, 1892, provides that it shall be unlawful for any officer of the United States Government or any contractor or subcontractor whose duty it shall be to employ, direct or control the services of laborers or mechanics (on public works) to require or permit any such laborer or mechanic to work more than eight hours in any one calendar day except in case of extraordinary emergency. But where a sub-contractor purchased window blinds, sashes, etc., for a public building at a factory in which the employes were working more than eight hours a day, but over whom he had no control, it was held that the statute did not apply. Card 7323, *November, 1899*.

1243. An executive officer cannot, in view of Sec. 3738, Rev. Sts., legally direct that laborers, workmen and mechanics employed by and on behalf of the Government shall be given time without loss of pay to vote on election day, if such indulgence would reduce the number of working hours below eight. Card 2692, *October, 1896*.

**1244.** *Held* that a "hostler" at an arsenal is neither a "laborer" nor a "mechanic" within the meaning of the eight hour act of 1892. Card 3673, *November, 1897*. Similarly *held* with respect to lock employes on river locks.<sup>1</sup> Card 4814, *August, 1898*.

**1245.** It is not the duty of the Secretary of War to institute proceedings for violations of the act of 1892. Parties who think the law is being violated by contractors should submit their complaints to the proper United States attorney. Card 7323, *November, 1899*.

#### EMINENT DOMAIN.

**1246.** Where money appropriated for the purchase of land for the erection of monuments, &c., was not sufficient to accomplish the entire purpose set out in the statute, *held* that, in obedience to the spirit of Sec. 3733, Rev. Sts., no step should be taken toward acquiring or condemning lands, until further appropriations were made. **37, 203, December, 1889.**

**1247.** *Held* that there was no general act of Congress making State courts an agency of the United States for the purpose of condemning lands; and that proceedings for this purpose should be had in a U. S. court under an act of Congress, or in a State court when such court has been by such act made an agency for the purpose. **38, 271, February, 1890.**

#### ENGINEER CORPS OR OFFICER.

**1248.** There is no legal objection to the detailing of a sergeant of one of the companies of the Battalion of Engineers to act as first sergeant of the company; but of course such acting first sergeant can receive no more or other pay than that of sergeant. **62, 126, October, 1893.**

**1249.** Under sec. 20 of the act of March 1, 1893, "to create the California Debris Commission," &c., the Secretary of War is clearly authorized to assign an engineer officer to duty under the orders of the Commission. **61, 133, August, 1893.**

**1250.** As to the disposition, by the Corps of Engineers, of charts of the northwestern lakes *held* that, under Sec. 226, Rev. Sts., as amended by the appropriation acts for the naval service of May 4, 1878, and Feb. 14, 1879, all charts hereafter furnished to mariners are to be paid for at the cost price of the paper and printing as paid by the Government. **38, 210, 477, January and February, 1890.**

<sup>1</sup>See 20 Opins. At. Gen., 459, 463, and A. R. 728 (812 of 1901).

## ENLISTMENT.

1251. While the taking of the oath prescribed by the 2d Article of War is not *essential* to the validity of an enlistment, it is an almost invariable part of a regular formal enlistment, and, in the absence of any provision in our law prescribing what shall constitute an enlistment, the oath as taken and subscribed by the party is the regular and, in some cases, the only, legal written evidence that the personal act of enlisting has been completed by him.<sup>1</sup> XXX, 313, *May, 1870*; XLII, 203, *March, 1879*; Card 4631, *July, 1898*.

1252. Due enlistment and the receipt of pay are placed upon the same footing by the 47th Article of War. *Held* therefore that receipt of pay from the United States, as a soldier, estops the party from denying the status which he has thus openly assumed, when sought to be made amenable as a deserter. VII, 132, *February, 1865*. A party who has voluntarily rendered service as an enlisted man and as such has been armed, clothed, and fed by the Government is estopped from denying the validity of his contract of enlistment upon the ground of informality therein, and is entitled to pay for the period of such service. XIX, 397, *January, 1866*.

1253. The allegation in a specification to the charge of desertion, that the accused was "duly enlisted," *held* established by evidence of his identification as a member of his company, or of facts that show an acquiescence on his part in the status of a soldier, such as the receipt of pay, doing of military duty, etc.<sup>2</sup> XII, 361, *February, 1865*.

1254. A soldier deserted in December, 1863, was subsequently dishonorably discharged and confined for the desertion by sentence of a court-martial, but, pending the confinement, was pardoned by the President "on condition of returning and faithfully serving out his time in his regiment." He complied with this condition and was honorably discharged. *Held* that his returning to his regiment and entering upon duty as a soldier pursuant to his agreement with the President, constituted an enlistment for the period agreed upon. 65, 224, *June, 1894*.

<sup>1</sup>Our law not defining enlistment nor designating what proceeding or proceedings shall or may constitute an enlisting, it may be said in general that any act or acts which indicate an undertaking, on the part of a person legally competent to do so, to render military service to the United States for the term required by the existing law, and an acceptance of such service on the part of the Government, may ordinarily be regarded as legal evidence of a contract of enlistment between the parties, and as equivalent to a formal written agreement where no such agreement has been had.

<sup>2</sup>"On a charge of desertion or other offence against military discipline, it will be sufficient to prove that the accused received the pay or did the duties of a soldier without other proof of his enlistment on oath." 3 Greenleaf Evidence, § 483. And see *Lebanon v. Heath*, 47 N. Hamp., 359; *Ex parte Anderson*, 16 Iowa, 691.



**1255.** A soldier deserted from a volunteer regiment in 1862; was tried for the desertion, and dishonorably discharged in 1864. In February, 1865, he was arrested and illegally tried again for the same desertion, and sentenced to be assigned to duty with certain forfeitures and to make good time lost by the desertion. He was thereupon assigned to a company on April 12, 1865, and was honorably discharged on August 11th, following. *Held* that his acquiescing in the assignment and serving under it amounted to a constructive enlistment, making his status that of a soldier during the period of such service. Card 4965, September, 1898.

**1256.** A private in a volunteer company was in 1864 appointed captain in another regiment. He accepted and entered upon the office. Subsequently an order was issued purporting to revoke the appointment and directing his return to his original company as a private. He complied with the order. *Held* that while this order was in fact void he, by complying with it, abandoned the office of captain, and, by performing services as a private which were accepted and paid for by the Government, constructively enlisted again. Card 2293, June, 1896.

**1257.** A non-compliance with an army regulation in making an enlistment does not *per se* affect the validity of the contract. Thus the fact that a married man was enlisted in derogation of the regulations or procured his enlistment by representing that he was unmarried, *held* not to affect the validity of the enlistment.<sup>1</sup> XXXII, 72, October, 1871; XXXVIII, 616, June, 1877; XXXIX, 467, February, 1878.

**1258.** Secs. 1116-1118, Rev. Sts., so far as they relate particularly to the enlistment of deserters, convicted felons and persons over age, have not been regarded by the War Department as making such enlistments void, but as rendering them voidable merely at the option of the Government.<sup>2</sup> It has been uniformly held that a deserter who

<sup>1</sup> "If a man at the time of his enlistment denies that he is a married man and enlists as a single man, the fact that he has a wife and child does not entitle him to be discharged on *habeas corpus*, although it is provided in the Army Regulations that no married man shall be enlisted without special authority from the Adjutant-General's Office." *Ex parte Schmied*, 1 Dillon, 587 (1871—No. 12,461, Federal Cases). See similar ruling in *Ferren's case*, 3 Benedict, 442 (1869—No. 4,746, Federal Cases).

<sup>2</sup> Sections 1116-1118, Revised Statutes, forbid the enlistment of deserters, convicted felons, insane and intoxicated persons, persons over 35 years of age, minors under 16 years of age, and minors over 16 without the written consent of their parents or guardians. The Supreme Court held *In re Grimsley*, 137 U. S., 147, 153 that the enlistment of a person over 35 years of age was not void, but voidable at the option of the Government only. In delivering the opinion of the Court, Mr. Justice Brewer, excepting insanity, idiocy, infancy, or other causes which disable a party from changing his status, remarked with reference to the disqualifications of over age, desertion, and conviction of felony: "These are matters which do not inhere in the substance of the contract, do not prevent the change of status, do not render the new relations assumed absolutely void." The enlistment of a minor over 16 years of age without the written consent of the parent or guardian is not void but voidable only.



enlists and afterwards again deserts can not on being brought to trial for the second desertion properly set up that he is not amenable to trial on the ground that his enlistment was void. A plea or defence to this effect should not be sustained by the court. XLIII, 167, *January, 1880*; 42, 82, *July, 1890*.

1259. *Held*, in regard to the enlistment, in violation of Sec. 1118, Rev. Sts., of persons who had been convicted of felonies, that such enlistments were not void but voidable by the United States only. 48, 367, *August, 1891*; Card 9490, *December, 1900*.

1260. A soldier on trial for desertion from the army pleaded in bar of trial that as he was a deserter from the marine corps at the time of his enlistment, it was void. *Held* that the court properly overruled the plea. While the enlistment in the army was fraudulent, it was not void, but voidable at the option of the Government only, which might hold him to the existing obligations of either or both enlistments. Fraud gives only the defrauded party the option of disaffirming the contract, but until so disaffirmed it remains good.<sup>1</sup> XLVIII, 203, *December, 1883*; LV, 479, 482, *April, 1888*.

1261. There is no law or regulation affecting the validity of an enlistment made on Sunday.<sup>2</sup> XXXIII, 562, *December, 1872*; Card 2619, *September, 1896*.

1262. The engagement alike of officers and soldiers when entering the Army has always been held to recognize, and to be subject to, the right of the Government to change by law their pay and allowances in its discretion as the public interests may require. *Held* therefore that a contract of enlistment was not violated by the United States by the reduction by act of Congress, pending his enlistment, of the pay

*In re Morrissey*, 137 U. S., 157. It is not voidable at the instance of the minor (*id.*); but is voidable by the United States or by the parent or guardian. *Id.*, *In re Wall*, 8 Fed. Rep., 85; *In re Davison*, 21 *id.*, 618; *In re Hearn*, 32 *id.*, 141; *In re Cosensow*, 37 *id.*, 668; *In re Dohrendorf*, 40 *id.*, 148; *In re Spencer*, *id.*, 149; *In re Lawler*, *id.*, 233; *In re Dowd*, 90 *id.*, 718; *McConeogue's Case*, 107 Mass., 170. As the enlistment of such a minor is not void but voidable only, he is, until the enlistment is duly avoided, legally a soldier and can desert or commit any other military offence, and when held for trial or punishment therefor, the interests of the public in the administration of justice are paramount to the right of the parent or guardian, and require that the soldier shall abide the consequences of his offence before the right to his discharge is passed upon. *In re Cosensow*, 37 Fed. Rep., 668; *In re Kaufman*, 41 *id.*, 876; *In re Dowd*, 90 *id.*, 718; *McConeogue's Case*, 107 Mass., 170. See, also, General Orders, No. 127, A. G. O., 1900, and other authorities cited therein. *In re Lawler*, 40 Fed. Rep., 233, it was held that the enlistment of a minor under 16 years of age would be void, with or without the consent of the parent, but this is not thought to be the correct view. The statute probably renders the enlistment voidable at the instance of the minor, as well as at the instance of the parent or guardian where the enlistment was without his consent, but if the minor has capacity to enter into the status of a soldier, and while in that status commits a military offence, he should abide the consequences of the offence before being discharged.

<sup>1</sup> *Engelw*, Law of Fraud, 121.

<sup>2</sup> The same is held in the English case of *Wolton v. Gavin*, 16 Q. B., 48.

of a soldier from sixteen to thirteen dollars per month.<sup>1</sup> XXXIV. 442. *September, 1873.*

1263. *Held* that the enlistment of certain volunteer soldiers in 1862 "for three years or during the war" meant three years from the date of muster, if the war should last that long, and if it should not, then until it should end; that the reference to the duration of the war was a restriction and not an extension of the term.<sup>2</sup> XLII, 524. *March, 1880; Card 6312, April, 1899.*

1264. The enlistment of a minor without the consent of his parent or guardian is not void, but voidable; until avoided it is valid.<sup>3</sup> XLIX, 353, 376. *October, 1885; L, 139-143, March, 1886.* It is well established that when a minor enlists without consent he remains subject to the Articles of War, until discharged by proper authority. XLIX, 353, 376, *supra*; Card 2870. *January, 1897.*

1265. The Army Regulation requiring consent of parent or guardian applies to an Indian minor enlisting in the army. But an Indian agent is not, as such, the guardian of an Indian minor under his charge within the meaning of the Regulation. Card 184. *August, 1894.*

1266. It is not practicable to prescribe what misconduct shall constitute a failure to render honest and faithful service within the meaning of the act of Congress approved August 1, 1894, regulating enlistments. Each case should be decided upon its own merits. Card 2158. *March, 1896.* It is a matter entrusted to the discretion of the Secretary of War.<sup>4</sup> The restriction imposed upon him by the proviso in sec. 1, of the act of June 16, 1890, being limited solely to the purposes of that act, does not apply to the act of 1894. Cards 2004. *January, 1896; 2121, March, 1896; 3794, January, 1898; 5569, December, 1898.*

1267. Where a soldier has been discharged without honor upon the ground that his service was not honest and faithful, *held* that while the discharge could not be revoked, the Secretary of War could upon an application to enlist reconsider the question of the character of the

<sup>1</sup> "The Executive department has discretionary authority to discharge before the term of service has expired, (4th A. W.), but has no power to vary the contract of enlistment." 4 Op. At. Gen., 538. (1847.)

The Secretary of War can release a soldier from his contract of enlistment by a discharge, but has no power to suspend it, even with the soldier's consent. 15 Op. At. Gen., 362. (1877.)

<sup>2</sup> *Brentenbach v. Bush*, 44 Pa. St., 317. And see *Clark v. Martin*, 3 Grant's Cases, 393, do., 5 Phila., 254.

<sup>3</sup> *In re Wall*, 8 Fed. Rep., 85; *McConologue's case*, 107 Mass., 170; *In re Drow*, 25 Law Rep., 338; *In re Graham*, 8 Jones (N. C.), 416; *Wibbar v. Grace*, 12 Johns., 67; *Ex parte Anderson*, 16 Iowa, 598; *Com. v. Gamble*, 11 Sergt. & Rawle, 93; *Tyler v. Pomroy*, 8 Allen, 480, 501. See notes to §§ 1180, 1181, and 1258, *ante*.

<sup>4</sup> See 3 Comp. Dec., 557.

applicant's service, and if found to have been in fact honest and faithful, could authorize his enlistment. Cards 1197, *April, 1895*; 2423, *July, 1896*; 3131, *April, 1897*.

1268. Dishonorable discharge is *prima facie* evidence that service during the term of enlistment, which it terminated, was not honest and faithful. It is however within the discretion of the Secretary of War to determine for the purpose of enlistment whether such term was honest and faithful, and he may decide on the facts in a particular case that it was, even where there has been a dishonorable discharge. Cards 4406, 4419, *June, 1898*; 4465, 4601, 4667, *July, 1898*; 5339, *November, 1898*; 5675, *April, 1899*; 6477, *August, 1899*; 6727, *June, 1899*; 7070, *September, 1899*; 9039, *September, 1900*.

But, in general, service during a term of enlistment from which a soldier was dishonorably discharged, particularly with confinement at hard labor, is viewed as not honest and faithful. Cards 853, 1072, 1097, 1588, *January to July, 1895*; 2496, 2769, *August and November, 1896*; 3068, 3170, 3722, *April to December, 1897*; 4668, 4748, 4783, *July and August, 1898*; 5643, *January, 1899*. Where a soldier in fact deserts, and his enlistment is terminated by a dishonorable discharge therefor pursuant to the sentence of a court martial, his service during such term ought not to be considered honest and faithful. Card 6570, *June, 1899*.

1269. The act of Aug. 1, 1894, applies to all enlistments for the army. *Held*, therefore, that the enlistment of an Indian must be for the term of three years. Card 249, *August, 1894*.

1270. The enlistment of an alien between 16 and 18 years of age, whose parents have never been in this country and are dead, not being a citizen or capable of declaring his intention to become one, is prohibited by the act of August 1, 1894. But all persons born in the United States and subject to the jurisdiction thereof are citizens.<sup>1</sup> This includes minors born in the United States of alien parents. Cards 181, 804, *August and December, 1894*.

1271. Children of alien parents reaching their majority after their parents are naturalized are citizens, but it is otherwise if they reach their majority before their parents are naturalized. An alien minor can not declare his intention to become a citizen for the purpose of enlistment in the regular army. Cards 168, *August, 1894*; 5550, *December, 1898*; 6726, *July, 1898*.

1272. Under its constitutional power to raise and support armies, Congress can designate the classes of persons from which enlistments shall or shall not be made. This is done in the act approved August

<sup>1</sup> XIVth Amendment of the Constitution.

1, 1894, which, among other things, provides that no soldier shall be again enlisted in the army whose service during his last preceding enlistment has not been honest and faithful. If such service has not been honest and faithful, the soldier is ineligible for enlistment. The character of service rendered is a conclusion based upon a fact or facts. Military offences which the soldier may have committed, or of which he has been convicted may constitute these facts. A full pardon for such offences would relieve the soldier from further punishment for them, would in legal contemplation obliterate them as offences, but would not blot them out so far as they involved conceded accomplished acts or facts to be considered in determining whether the soldier's service had been honest and faithful. *Held*, therefore, where a soldier had been convicted of desertion, dishonorably discharged, and confined by sentence of a court-martial, that a full pardon would not affect the conceded unauthorized absence and violation of the oath of enlistment; that if these facts justified the conclusion that his service had not been honest and faithful he was ineligible for enlistment; and further that the pardon in restoring his rights of citizenship would not restore his eligibility for enlistment, as enlistment is not a right of citizenship.<sup>1</sup> Cards 1765, 1883, *October* and *November*, 1895; 3125, *April* and *June*, 1897; 4513, 4645, *July*, 1898.

1273. *Held*, also, that a full pardon after conviction of a felony would not remove the ineligibility for enlistment, which such conviction constitutes under the provisions of Sec. 1118, Rev. Sts. The pardon releases the offender from all disabilities imposed by the offence and restores him to all his civil rights. In contemplation of law it so far blots out the offence that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. But the conviction of the felony remains an accomplished fact. This fact constitutes a statutory disqualification for enlistment; and as the privilege of enlisting in the army is not one of the legal rights of a person, a pardon of the felony after conviction cannot remove the ineligibility for enlistment created by the fact of conviction. 36, 262, *November*, 1889; Card 3125, *June*, 1897.

1274. A soldier was dishonorably discharged with confinement in a penitentiary by sentence of a court-martial, and pending the confinement, the unexecuted portion was remitted. *Held*, that he was not eligible for enlistment, his service during his last term not having been honest and faithful; and that the remission did not make him eligible. Card 1072, *February*, 1895.

1275. Where a discharged soldier whose service during his last term was not honest and faithful is again enlisted through false representa-

<sup>1</sup> See opinion of Atty. Gen. of Feb. 9, 1898 (22 Opins., 36)



tions as to such term, *held* that such enlistment though in violation of the act of August 1, 1894, was not void, but voidable only at the option of the Government. Card 1512, *July, 1895*. So, where a soldier had been discharged without honor from the preceding term of enlistment and had by concealing this fact again enlisted, it was held that though the latter enlistment were viewed as both fraudulent and in violation of the act of August 1, 1894, the Secretary of War could cause him to be tried for the fraudulent enlistment, or summarily discharged therefor without honor, or to serve out the enlistment. Card 4077, *April, 1898*.

1276. The act of August 1, 1894, prescribes that no person who is over 30 years of age shall in time of peace be enlisted for the first enlistment in the army. *Held* that an enlistment in the marine corps would not render a subsequent enlistment in the army a second enlistment under this act and thus remove the limitation as to age; service in the marine corps not being service in the army. Cards 1339, *May, 1895*; 2530, *August, 1896*; 3758, *January, 1898*.

1277. The act of August 1, 1894, is limited to "time of peace". *Held*, therefore, that the enlistment of four musicians formerly in the Spanish Army in Porto Rico, could, the war with Spain not having terminated, legally be authorized. Card 5148, *October, 1898*.

1278. The "last preceding term of enlistment" as used in sec. 2 of the act of August 1, 1894, is not limited to service in the regular army; it applies as well to service in the volunteer army. Cards 5840, 6203, *March and April, 1899*.

1279. The term of three months after honorable discharge within which a man may be re-enlisted under the act of August 1, 1894, begins on the day next following the day of discharge. Card 1084, *March, 1895*.

1280. The enlistment of an Indian prisoner of war terminates his status as such prisoner, and he cannot be returned to it on his discharge from the service. Cards 10, *July, 1894*; 1193, *April, 1895*.

1281. An enlistment in the United States army does not under any law of the United States operate as a discharge from the national guard of a State. Card 5753, *January, 1899*.

1282. The statute (act of March 3, 1899) which authorizes the enlistment of cooks in the army makes no limitation as to the race to which the persons so enlisted may belong. *Held*, therefore, that there was no legal objection to the enlistment as cooks of Japanese who are citizens of the United States. Card 6751, *July, 1899*.

1283. By the act of March 2, 1899, it is provided "that the limits of age for original enlistments in the army shall be eighteen and thirty-five years." *Held*, that the fact that an applicant over thirty-five



years of age, and without prior service as an enlisted man, had served as an officer of volunteers, would not prevent his enlistment from being an *original* enlistment within the meaning of the statute. Card 6844, *August, 1899*.

1284. There is no statute that authorizes even the President to accept into or retain in the military service of the United States an individual soldier on a condition that he shall be sent to this or that part of the country to serve. A practice of entering into such agreements would soon prove impracticable and inconsistent with public policy and the interests of the service. Card 6731, *July, 1899*.

#### EVIDENCE.

1285. Courts-martial should in general of course follow—so far as apposite to military cases—the rules of evidence observed by the civil courts, and especially the courts of the United States, in criminal cases.<sup>1</sup> They are not bound, however, by any statute in this particular, and it is thus open to them, in the interest of justice, to apply these rules with more indulgence than the civil courts; to allow, for example, more latitude in the introduction of testimony and in the examination and cross-examination of witnesses than is commonly permitted by the latter tribunals. In such particulars, as persons on trial by courts-martial are ordinarily not versed in legal science or practice, a liberal course should in general be pursued, and an over-technicality be avoided.<sup>2</sup> XXIX, 480, *December, 1869*; XXXI, 273, *March, 1871*; XLII, 74, *December, 1878*; LV, 497, *March, 1888*; Card 8471, *June, 1900*.

1286. The rules of evidence should be applied by military courts irrespective of the rank of the person to be affected. Thus a witness for the prosecution, whatever be his rank or office, may always be asked on cross-examination, whether he has not expressed animosity toward the accused, as well as whether he has not on a previous occasion made a statement contradictory to or materially different from that embraced in his testimony. Such questions are admissible by the established law of evidence and imply no disrespect to the witness, nor can the witness properly decline to answer them on the ground that it is disrespectful

<sup>1</sup>See 3 Greenl. Ev., § 476; *Lebanon v. Heath*, 47 N. Hamp., 359; *People v. Van Allen*, 55 N. York, 39, 2 Opus. At. Gen., 343; *Grant v. Gould*, 2 H. Black., 87; 1 McArthur, 47; *McNaghten*, 180; *Harcourt*, 76; *DeHart*, 334; *O'Brien*, 169, G. O. 51, Middle Dept., 1865; G. C. M. O. 60, Dept. of Texas, 1879; do. 3, 52, Dept. of the East, 1880.

<sup>2</sup>Compare the views expressed in G. C. M. O. 32 War Dept., 1872, do. 23, Dept. of Texas, 1873; do. 60, Dept. of California, 1873. See also *Court-Martial Manual* (1901), par. 2, p. 42.

to him thus to attempt to discredit him.' XXXII, 642, *May, 1872*; XLI, 33, *October, 1877*.

1287. The weight of evidence does not depend upon the *number* of the witnesses. A single witness, whose statements, manner, and appearance on the stand (see § 1365, *post*) are such as to commend him to credit and confidence, will sometimes properly outweigh several less acceptable and satisfactory witnesses.' XXXV, 55, *December, 1873*.

1288. Evidence of the good character, record, and services of the accused as an officer or soldier is admissible in all military cases without distinction—in cases where the sentence is mandatory as well as those where it is discretionary—upon conviction. For, where such evidence cannot avail to affect the measure of punishment, it may yet form the basis of a recommendation by the members of the court, or induce favorable action by the reviewing officer whose approval is necessary to the execution of the sentence. XIX, 35, *October, 1865*; XXXVI, 446, 471, *May, 1875*. Where such evidence is introduced, the prosecution may offer counter testimony, but it is an established rule of evidence that the prosecution cannot attack the character of the accused till the latter has introduced evidence to sustain it, and has thus put it in issue.' XXVIII, 593, *May, 1869*.

1289. Upon a trial where the offence is drunkenness or drunken conduct charged under Article 62, or drunkenness on duty charged under Article 38, it is not essential to confine the testimony to a description of the conduct and demeanor of the accused, but it is admissible to ask a witness directly if the accused "was drunk," or for a witness to state that the accused "was drunk," on the occasion or under the circumstances charged. Such a statement is not viewed by the authorities as of the class of expressions of *opinion* which are properly ruled out on objection unless given by experts, but as a mere statement of a matter of observation, palpable to persons in general, and so proper to be given

<sup>1</sup> See opinion of the Judge Advocate General, as adopted by the President, in G. C. M. O. 96, Hdqrs. of Army, 1870; and compare remarks of reviewing officers, in G. O. 11, Dept. of California, 1865; G. C. M. O. 31, Dept. of Dakota, 1869; do. 8, Fourth Mil. Dist., 1867.

<sup>2</sup> Compare *Rudolph v. Lane*, 57 Ind., 115; *McCrain v. Corby*, 15 Kans., 117.

<sup>3</sup> In commencing the examination of a witness, it is a *leading* of the witness, and objectionable, to read to him the charge and specification or specifications, since he is thus instructed as to the particulars in regard to which he is to testify and which he is expected to substantiate. So to read or state to him, in substance the charge and ask him "what he knows about it," or in terms to that effect, is loose and objectionable, as encouraging irrelevant and hearsay testimony. The witness should simply be asked to state what was said and done on the occasion, &c. A witness should properly also be examined on specific interrogatories, and not be called upon to make a general statement in answer to a single general question. Compare G. O. 12, Dept. of the Missouri, 1862, do. 36 *et.*, 1863, do. 29, Dept. of California, 1865, do. 67, Dept. of the South, 1874; G. C. M. O. 14, 24, Dept. of Dakota, 1877.

by any witness as a *fact* in his knowledge.<sup>1</sup> XXII, 635, *March, 1867*; XXIV, 79, *December, 1876*.

1290. A statement to the effect that a person was intoxicated not inadmissible in evidence as being an expression of an *opinion*. Whether a person is drunk or sober is "a fact patent to the observation of all, requiring no scientific knowledge."<sup>2</sup> LVI, 165, *May, 1888*.

1291. Except by the consent of the opposite party, the testimony contained in the record of a previous trial of the same or a similar case cannot properly be received in evidence on a trial by court-martial; nor can the record of a board of investigation ordered in the same case be so admitted without such consent. In all cases (other than that provided for by the 121st Article of War) testimony given upon a previous hearing, if desired to be introduced in evidence upon a trial, must (unless it be otherwise specially stipulated between the parties) be offered *de novo* and as original matter. XIX, 41, *October, 1865*; XXVII, 318, *October, 1868*.

1292. Affidavits, taken *ex parte*, and not as depositions under Art. 91, are in no case admissible as evidence on a trial by court-martial, if objected to.<sup>3</sup> VII, 113, *February, 1864*.

1293. The muster rolls on file in the War Department are official records and copies of the same, duly certified, are evidence of the facts originally entered therein and not compiled from other sources—subject of course to be rebutted by proper evidence that they are mistaken or incorrect. III, 523, *August, 1863*. So though such rolls are evidence that the soldier was duly enlisted or mustered into the service and is therefore duly held as a soldier, they may be rebutted in this respect by proof of fraud or illegality in the enlistment or muster (on the part of the representative of the United States or otherwise), properly invalidating the proceeding and entitling the soldier to a discharge.<sup>4</sup> VIII, 488, *May, 1864*.

<sup>1</sup> *People v. Eastwood*, 14 N. York, 562; *Stacy v. Portland Pub. Co.*, 68 Maine, 279; *Sydeleman v. Beckwith*, 43 Conn., 12; *State v. Huxford*, 47 Iowa, 16; G. O. 42, Dept. of the Platte, 1871.

<sup>2</sup> *Lawson on Expert and Opinion Evidence*, p. 473, *et seq.*

<sup>3</sup> See G. O. M. O. 10, Hdqrs. of Army, 1879; G. O. 21, Dept. of the Missouri, 1863; do. 17, Dept. of Arkansas, 1866; do. 19, Third Mil. Dist., 1867; do. 49, Dept. of Dakota, 1871.

<sup>4</sup> As applied to military cases, it would be better to say, in lieu of the expression "if objected to," "unless expressly consented to by the accused with full knowledge of his rights."

<sup>5</sup> But note in this connection the ruling of the Supreme Court of Massachusetts in the case of *Hanson*—8 Scituate, 115 Mass., 336, that an official certificate from the Adjutant General's Office to the effect that certain facts appeared of record in that office but which did not purport to be a transcript from the record itself, and was therefore simply a personal statement, was not competent evidence of such facts.

It was held by the U. S. Supreme Court in *Evanson v. Gunn*, 9 Otto, 690, that the record, made by a member of the U. S. Signal Corps of the state of the weather and

1294. General orders issued from the War Department or Headquarters of the Army may ordinarily be proved by printed official copies in the usual form. The court will in general properly take judicial notice of the printed order as genuine and correct. A court martial, however, should not, in general, accept in evidence, if objected to, a printed or written *special* order, which has not been made public to the army, without some proof of its genuineness and official character.<sup>1</sup> XV, 216, *May, 1865*.

1295. In view of the embarrassment which must generally attend the proof before a court-martial of the sending or receipt of telegraphic messages by means of a resort, by *subpoena duces tecum*, to the originals in possession of the telegraph company,<sup>2</sup> *advised* that the written or printed copy, furnished by the company and received by the person to whom it is addressed, should in general be admitted in evidence by a court martial in the absence of circumstances casting a reasonable doubt upon its genuineness or correctness. But where it is necessary to prove that a telegram which was not received, or the receipt of which is denied and not proven, was actually duly sent, the operator or proper official of the company, or other person cognizant of the fact of sending, should be summoned as a witness. V, 458, *December, 1863*; XIV, 259, *March, 1865*.

1296. A court-martial (by *subpoena duces tecum*, through the judge advocate) may summon a telegraph operator to appear before it and bring with him a certain telegraphic dispatch. But it is beyond the power of such court to require such witness against his will to surrender the dispatch, or a copy, to be used in evidence, if he be a civilian. 31, 449, *April, 1889*. (See note to § 231, *ante*.)

1297. The fact that a party is a public enemy of the United States or has engaged in giving aid to the enemy does not affect the competency of his testimony as a witness before a court martial. Where testifying, however, in time of war, either in favor of a person in the enemy's service or an ally of or sympathizer with the enemy, or against a Federal officer or soldier, his statements (like those of an accomplice) are ordinarily to be received with caution unless corroborated. IX, 164, 173, *June, 1864*; X, 330, *September, 1864*; XIII, 409, *March, 1864*;

the direction and velocity of the wind on a certain day, was competent evidence of the facts reported, as being in the nature of an official record kept by a public officer in the discharge of a public duty.

But that the entries in such rolls are not proof of the commission of an offence, as desertion for example, see § 1056, *note*.

<sup>1</sup> See a similar ruling in G. O. 121, Second Military District, 1867.

<sup>2</sup> The subject of the extent of the authority of the courts to compel telegraph companies to produce original private telegrams for use in evidence is most fully treated in an essay by Henry Hitchcock, Esq., on the "Inviolability of Telegrams," published in the Southern Law Review for October, 1879.



XIV, 645, *June, 1865*; XX, 86, *October, 1865*; XXI, 54, *November, 1865*.

**1298.** Desertion is not a felony and does not render a witness incompetent at common law or before a court martial. Nor does the loss of citizenship upon conviction of desertion, under Secs. 1996 and 1998, Rev. Sts., have such effect; the competency of a witness not depending upon citizenship. A pardon of a person thus convicted would not therefore add to his competency. But where it was proposed to introduce such a person as a material witness for the prosecution in an important case, *advised* that it would be desirable to remit the unexecuted portion of his sentence, if any. LI, 254, *December, 1886*.

**1299.** A confession is competent evidence when free and voluntary; otherwise where made through the influence of fear or hope of favor.<sup>1</sup> So a confession that he had deserted, made by an alleged deserter to a police officer, who, on arresting him, assured him that if he told the truth he (the officer) would give him an opportunity to escape before being delivered up to the military authorities—*held* clearly not admissible in evidence as having been induced by promise of favor on the part of a person in authority. LV, 217, *December, 1887*.

**1300.** The testimony of an accused party is competent only when presented as authorized by the act of Feb. 16, 1878, c. 37, *viz.*, when the party himself *requests* to be admitted to testify. Such testimony is not excepted from the ordinary rules governing the admissibility of evidence, nor from the application of the usual tests of cross examination, rebuttal, &c.<sup>2</sup> But an accused so testifying cannot be compelled against his objection to criminate himself.<sup>3</sup> Card 1495, *July, 1895*.

**1301.** It is in general competent, on trials by court martial, for the accused to put in evidence any facts going to extenuate the offence and reduce the punishment, as the fact that he has been held in arrest

<sup>1</sup> *United States v. Pamphreys*, 1 Cranch C. C., 74; *United States v. Hunter*, *id.*, 317; *United States v. Charles*, 2 *id.*, 76; *United States v. Peckington*, *id.*, 296; *United States v. Nott*, 1 McLean, 499; *United States v. Cooper*, 3 Q. L. J., 42.

If an officer were to admit to a superior, in writing, the commission of a military offence and promise not to repeat the same, under the well founded hope and belief that a charge which had been preferred against him therefor would be withdrawn, the admission thus made, in case he were actually brought to trial upon such charge, would not properly be received in evidence against his objection. Confessions made by privatesoldiers to officers or non commissioned officers, though not shown to have been made under the influence of promise or threat, should yet, in view of the military relations of the parties, be received with caution. See G. C. M. O. 3, War Dept. 1876; G. O. 54, Dept. of Dakota, 1867. And compare *Cady v. State*, 44 Miss., 332.

More silence on the part of an accused, when questioned as to his supposed offence, is not to be treated as a confession. See *Campbell v. State*, 55 Ala., 80.

<sup>2</sup> See G. C. M. O. 8, 16, Dept. of the Platte, 1879, do 6, *id.*, 1880, do 34, Dept. of Texas, 1879. And compare *Wheeler v. Wilson*, 44 Maine, 11; *Marx v. People*, 63 Barb., 618; *Franklin v. People*, 65 *id.*, 48; *Pease v. McConzill*, 41 Cal., 429; *Clark v. State*, 50 Ind., 514; *Fitzpatrick v. U. S.*, 178 U. S., 304.

<sup>3</sup> 59 Albany Law Journal, 510.



or confinement an unusual period before trial; the fact that he has already been subjected to punishment or special discipline on account of his offence; the fact that his act was in a measure sanctioned by the act or practice of superior authority, &c. XXVIII, 104, *August, 1868*.

1302. The law presumes that public officers duly perform their official functions, and this presumption continues till the contrary is shown. 42, 246, *August, 1890*.

1303. Official communications between the heads of the departments of the Government and their subordinate officers are privileged. Were it otherwise it would be impossible for such superiors to administer effectually the public affairs with which they are entrusted. 52, 344, *March, 1892*.

1304. Where a witness for the prosecution was permitted by a court-martial to temporarily suspend his testimony and leave the courtroom for the purpose of refreshing his memory as to certain dates, *held* that such action was irregular and the further testimony of the witness as to such dates inadmissible. By the course pursued the court and accused were prevented from knowing by what means the memory of the witness had been refreshed—whether, for instance, it may not have been refreshed by oral statements of some person or persons. 24, 284, *May, 1888*.

1305. A wife is not a competent witness to prove a charge of failing to support her, for which her husband is on trial. XLVII, 521, *September, 1884*.

1306. Where a conviction of rape rested mainly on the testimony of the victim, a child of eight years of age, *held* that the competency of the witness was doubtful, and that the trial should have been suspended and the child instructed.<sup>1</sup> L, 37, *February, 1886*.

1307. An insane person is no more competent as a witness before a court-martial than at common law. Testimony admitted of a person shown to be insane should be stricken out on motion made. 50, 270, *November, 1891*.

1308. Upon a trial of a cadet of the Military Academy, the court, against the objection of the accused, required another cadet, introduced as a witness for the prosecution, to testify as to facts which would tend to criminate him. *Held* that such action was erroneous, the not answering in such cases being a privilege of the witness only,<sup>2</sup> who (whether or not objection were made) could refuse to testify, and who, if ignorant of his rights, should be instructed therein by the court. 38, 194, *January, 1890*.

<sup>1</sup> Greenleaf on Evidence, § 367.

<sup>2</sup> That the accused cannot take advantage of the error, see Greenleaf on Evidence, 16th edition, vol. 1, § 409 d, p. 613.

1309. Copies of records of courts martial authenticated under the seal of the War Department, as provided by Sec. 882, Rev. Sts., are admissible in evidence "equally with the originals." LIV, 77, *July, 1887*. Similarly *held* with respect to such "patents, deeds or other conveyances or evidences of title," by which the United States holds lands, as are on file in the War Department. Cards 748, *December, 1894*; 1577, *July, 1895*.

1310. The enlistment paper, the physical examination paper and the outline card are *original* writings made by officers in the performance of duty and competent evidence of the facts recited therein. Copies, authenticated under the seal of the War Department, according to Sec. 882, Rev. Sts., are equally admissible with the originals.<sup>1</sup> 61, 218, *August, 1893*.

1311. Muster-in rolls are primary evidence of the dates of muster in as muster-out rolls are of the dates of muster-out. It is not the primary object of either muster-and-pay rolls or muster-out rolls to fix the date of muster-in. They cannot therefore be used to impeach the muster-in as fixed by the muster-in roll. Official records are of a high class of evidence as to the facts which are recorded in them pursuant to the special objects for which they are kept, but they have not this weight as evidence with reference to other facts incidentally recorded in them.<sup>2</sup> Card 9421, *December, 1900*.

1312. War Department Orders of May 15, 1894, sec. XV, paragraph 2, provides that "official copies of orders and other papers shall be authenticated solely by an impressed seal of the Bureau issuing the same, *e. g.*, 'Adjutant-General's Office, Official Copy.'" This provision was intended and should be construed to apply to copies of papers to be used in the administrative business of the War Department and not as evidence before courts, either civil or military. Copies so authenticated would not be admissible as evidence in civil courts. They would have to be authenticated as required by Sec. 882, Rev. Sts. In some cases copies of papers for use as evidence before courts-martial have been authenticated in the manner specified in Sec. 882, but in the majority of cases they have been authenticated by the official stamp of the bureau in the manner stated above. In the absence of objection, copies so authenticated by the bureau stamp would be legally admissible before courts martial; and as courts martial are not bound to follow strictly the rules of evidence observed by the civil courts, the Secretary of War could legally provide by regulation that

<sup>1</sup> Compare *Evanston v. Gunn*, 39 U. S., 600; *Sandy White v. U. S.*, 164 U. S., 100.

<sup>2</sup> *Unsettled Ex.*, 16 D1, vol. 1, §§ 491, 493. *Am. & Eng. Ency. of Law*, 1st Ed., vol. 20, p. 513.

in court martial trials such copies would be admissible notwithstanding the objection of the accused.<sup>1</sup> Card 8471, *June, 1900*.

1313. The Morning Report Book is an original writing. To properly admit extracts in evidence, the book should be first identified by the proper custodian, and the extracts then not merely read to the court by the witness, but copied and the copies, properly verified, attached as exhibits to the record of the court. 61, 218, *August, 1893*.

1314. A descriptive list is but secondary evidence and not admissible to prove the facts recited therein. It is not a record of original entries, made by an officer under a duty imposed upon him by law or the custom of the service, but is simply a compilation of facts taken from other records. 61, 218, *August, 1893*.

1315. Copies of pay accounts (charged to have been duplicated) are admissible in evidence where the accused has by his own act placed the originals beyond the reach of process, and fails to produce them in court on proper notice. XLVII, 269, *August, 1882*. Similarly *Id.*, where the originals were in the hands of a person who had left the United States so that they could not be reached, on notice to the accused to produce them or otherwise. LVI, 604, *September, 1888*.

1316. To the admission in evidence of a letter written and signed by the accused (of which the introduction is contested), proof of his handwriting is necessary. 61, 218, *August, 1893*. Evidence of handwriting by comparison is not admissible at common law except where the standard of comparison is an acknowledged or proved genuine writing already in evidence in the case. A writing not in evidence and simply offered to be used as a standard is not admissible. XIX, 566, *December, 1885*.

1317. At the trial, in 1894, of an officer charged with a disorder and breach of discipline which involved the killing by him of another officer, there was offered in evidence, on the part of the accused, to exhibit the character and disposition of the officer killed, a copy of a general court-martial order of 1872, setting forth certain charges alleging dishonest and unbecoming conduct, upon which the latter officer was then tried and convicted, and the findings of the court thereon. *Held* that such evidence was wholly inadmissible for the purpose designed. 65, 270, *June, 1894*.

<sup>1</sup> In accordance with these views, the following regulation by the Secretary of War was published in G. O. 91, A. G. O., 1900: "Copies of any records or papers in the War Department or any of its bureaus, if authenticated by the impressed stamp of the bureau or office having custody of the originals (e. g., 'Adjutant General's Office, Official Copy'), may be admitted in evidence equally with the originals thereof before any court martial, court of inquiry, or in any administrative matter under the War Department." See Court-Mar. Manual (1901), p. 42, note 3.

## EXAMINATION.

1318. *Held* that assistant surgeons of the rank of lieutenant were subject to examination under the act of October 1, 1890, c. 1241, "to provide for the examination of certain officers of the army and to regulate promotion therein."<sup>1</sup> 44, 374, *December, 1890.*

1319. *Held* that Secs. 1206 and 1208, Rev. Sts., relating to the examination of officers of the engineer and ordnance corps, were not repealed by the act of October 1, 1890, c. 1241, but remained fully in force.<sup>2</sup> 44, 88, *November, 1890.*

1320. Where an officer was sentenced "to retain his number on the lineal list of second lieutenants of infantry for three years," *held* that the sentence, while operative, rendered him ineligible for promotion under the act of October 1, 1890, and that his promotion pending the execution of the sentence would operate as a pardon. 47, 293, *May, 1891.*

1321. An enlisted man who has failed to pass a departmental board convened under G. O. 70, A. G. O., 1892, is not eligible for the final competitive examination authorized by the same order. Card 2422, *July, 1896.*

1322. *Held* that the construction given by General Orders 128, A. G. O., 1890, to the act of October 1, 1890, was correct. Card 3670, *November, 1897.*

1323. After the Secretary of War has approved the findings of an examining board and his action thereon has been communicated to the party examined, it is no longer revocable. Card 6671, *June, 1899.*

## EXTRADITION.

1324. By Art. II of the extradition treaty with Mexico of Dec. 11, 1861, it is stipulated that: "In the case of crimes committed in the frontier States or Territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said States or Territories, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory." So where a United States soldier charged with having committed a crime against the laws of Mexico was held in military custody within the State of Texas, *advised*, that as a

<sup>1</sup> See act of July 27, 1892 (27 Stats., 276).

<sup>2</sup> See G. O. 125 of 1890, par. VIII.



requisition by the Mexican government directly upon the military commander in Texas would not be authorized, such commander would not be justified in taking action upon an application for such surrender, and that any application made through him would properly be transmitted to the Secretary of War to be referred to the State Department. XXXVIII, 118, *July, 1876*.

1325. The extradition treaty between the United States and Mexico provides that "when from any cause the civil authority" of a frontier State, &c., of either nation "shall be suspended," the requisition shall be made "through the chief military officer in command of such State," &c. A criminal having escaped into Mexico from Texas at a time when the civil authority of that State was suspended as a result of the civil war, a requisition for him was issued not by the officer commanding in the State but by a subordinate of inferior rank. *Held* that as such action was clearly unauthorized, the Mexican government was justified in refusing to comply with the requisition, and that a new one should accordingly be made by the proper commander. XXIX, 4, *June, 1869*.

1326. Fugitives from justice are not surrendered by one government to another under extradition treaties, except on account of offences committed within the jurisdiction of the government demanding their extradition. So where a U. S. soldier deserted and went to Canada and there forged a check on the Assistant Treasurer, New York, which was paid, *held* that he could not be extradited for the forgery thus committed outside the jurisdiction of the United States. 53, 446, *May, 1892*.

1327. A soldier of the United States who has deserted to a place under the jurisdiction of Great Britain cannot be extradited on account of a military offence: such offences not being provided for in the extradition treaties between that country and the United States. 53, 446, *May, 1892*.

1328. The arrest and delivery of a soldier serving in the Philippine Islands or Cuba to the authorities of one of the United States is not, during the military occupancy of such places by the United States, a matter of international extradition. If a soldier so serving has been indicted in one of the States, the War Department may legally direct his surrender to such civil officer as may be sent, supplied with the proper papers, to receive him. Cards 5955, 6055, *March, 1899*.

#### EXTRA DUTY PAY.

1329. The act of July 13, 1866, c. 176, s. 7 (now Sec. 1287, Rev. Sts.) authorizes the payment to soldiers "working as artificers" of thirty-five cents "per day," in addition to their regular pay. The



"day," in a legal sense, consists of twenty-four hours, and it is not practicable to make two working days out of this period of time, so as to justify a double payment under the act. So *held* that a soldier, who did extra duty as an artificer at the U. S. Military Academy both night and day, was not entitled to a double compensation therefor.<sup>1</sup> XXVI, 276, *December, 1867*.

1330. *Held* that enlisted men of the Signal Service, while employed in constructing and working telegraph lines, and in observing and reporting storms and making reports for the benefit of agriculture and commerce might properly be classed as "artificers" within the meaning of the act of 1866, and paid accordingly.<sup>2</sup> XXXVIII, 184, *July, 1876*.

1331. *Held* that enlisted men detailed as "packers" or "chief packers" could scarcely be regarded as entitled to the extra allowance of thirty five cents per day as "artificers," but might legally be paid the allowance of twenty cents per day as "laborers," in addition to their regular pay as soldiers. XXXVI, 530, *June, 1875*.

1332. In view of the interpretation by successive Attorneys General,<sup>3</sup> of the term "other constant labor," employed in the act of March 2, 1819 (the original of the provision of July 13, 1866), as including clerical service, and of the continued practice of the Government in accord with such interpretation, *held* that enlisted men detailed as clerks might properly be regarded as entitled, for constant labor as such "of not less than ten days' duration," to the extra duty pay of twenty cents *per diem*. XXXVII, 297, *January, 1876*. But *held*, in view of the positive prohibition of Sec. 1765, Rev. Sts., that a soldier could not legally be allowed any additional compensation for such service further or other than such laborer's pay; and this although at the time of acting as clerk he was on leave of absence. XLII, 564, *March, 1880*.

1333. *Held* that an arsenal was a *post* within the meaning of Sec. 1281, Rev. Sts., relating to the establishing of schools at posts, &c., and that an enlisted man detailed as a school teacher at an arsenal was therefore entitled to the extra duty pay specified in the act of March 3, 1885, amending Sec. 1287, Rev. Sts. LV, 80, *September, 1886*.

1334. The provision as to extra duty pay of Sec. 1287, Rev. Sts., is evidently intended to cover only such labor as may legitimately be performed in the military service by soldiers as such. So *held* that an enlisted man could not legally be paid extra duty pay for services

<sup>1</sup> But see now A. R. 171 (189 of 1901.).

<sup>2</sup> Under the subsequent act, however, of June 20, 1878, reposing in the Secretary of War a special discretion on the subject, the right to the extra-duty pay has been restricted to a certain portion of this class of soldiers. See G. O. 54, Hdqrs. of Army, 1878. See also the Army Regulations and the annual army appropriation acts.

<sup>3</sup> 2 Opus. At. Gen., 706; 3 *id.*, 116, 4 *id.*, 325. And see also 10 *id.*, 472.

proposed to be rendered as a telegraph operator to a private telegraph company, the same being an employment for which he could not legally be detached from his legitimate duties as a soldier. LI, 281, *December, 1886*.

1335. The act of June 20, 1890, provides for the muster-out of the men of the Artillery Detachment at West Point and their immediate re-enlistment as "Army Service men in the Quartermaster Department." *Held* that this specific provision confined this particular detachment to the former artillerymen, but that it did not preclude the detail, under the general power of detail and assignment, of other enlisted men of the army for duty under the quartermaster at West Point, and that such men, when so detailed, would be entitled to the usual extra-duty pay allowed by law and regulations. 56, 327, *November, 1894*.

1336. The extra-duty pay is payable only for "constant labor for a period of not less than ten days." Thus *held* that a non-commissioned officer who acted, during a single day, as auctioneer at a sale of condemned quartermaster stores was not legally entitled to the payment of a ten per cent commission on the proceeds of the sale or to any other compensation whatever,<sup>1</sup> and that the post quartermaster, in paying him the said commission, was chargeable with a misapplication of public funds. 60, 363, *July, 1893*; 62, 95, *October, 1893*.

1337. The Army Appropriation Act for the fiscal year ending June 30, 1896, provided for extra duty pay to enlisted men in the Subsistence and Quartermaster Departments, but made no provision for payment to enlisted men detailed on extra duty outside of those departments; *Held*, therefore, that there was no appropriation from which an enlisted man detailed on extra duty as messenger and typewriter at the United States Infantry and Cavalry School, Fort Leavenworth, Kansas, could be paid. Card 2036, *February, 1896*.

1338. The Army Appropriation Act of 1885-6 (23 Stats., 359), provided that thereafter extra duty pay of enlisted men on extra duty at constant labor of not less than ten days would "be paid at the rate of fifty cents per day for mechanics, artisans, school teachers and clerks, at army, division and department headquarters, and thirty five cents per day for other clerks, teamsters, laborers and other enlisted men on extra duty." *Held* that this would authorize the payment of extra duty pay to enlisted men detailed as clerks at post and regimental headquarters whenever there is money available for such payment; but *remarked* that the current army appropriation act contained

<sup>1</sup>This view was concurred in by the Second Comptroller of the Treasury, in a decision published in Circ. No. 3, A. G. O., 1894, overruling prior decision of May 22, 1893.

no appropriation from which the payment could be made. Card 3762, *January, 1898.*

1339. Sec. 6 of the act of April 26, 1898, "For the better organization of the line of the army," in providing that in war time no additional increased compensation (*i. e.*, additional to the twenty per centum increase) shall be allowed to soldiers performing what is known as extra or special duty, applies to increased compensation made directly from appropriations for the support of the army and not to payments made from the company, bakery or post exchange funds. Cards 4414, 4539, 4540, 5442, *June to December, 1898*; 5661, *January, 1899.*

1340. The army regulation providing for the payment from the company fund of the extra compensation of twenty-five cents per day to enlisted men who are cooks has reference to ordinary enlisted men and does not apply to persons enlisted under the act of July 7, 1898, as cooks with the rank and pay of corporals.<sup>1</sup> Card 4762, *August, 1898.*

1341. War between the United States and Spain as declared by act of Congress approved April 22, 1898, existed when the act of April 26, 1898, was passed. *Held*, therefore, that enlisted men in all departments of the army ceased to be entitled to extra duty pay upon the date of the approval of the last named act. Cards 4089, 4135, 4143, 4144, *May, 1898*; 4256, *June, 1898.*

1342. The deficiency appropriation act of May 4, 1898, covering a period to January 1, 1899, appropriated a named sum for "extra pay to soldiers employed on extra duty under the direction of the Quartermaster's Department." *Held* that this appropriation was subject to the prohibition contained in the act of April 26, 1898; and that unless there was a time of peace before January 1, 1899, it should be allowed to lapse. Card 4089, *May, 1898.*

1343. *Held* that as long as the 20 per centum increase of pay was paid to enlisted men under the act of April 26, 1898, the payment of extra duty pay was prohibited. Cards 6322, 6340, 6411, *April and May, 1899.*

1344. *Held* that under the Army Appropriation Act approved May 26, 1900, all enlisted men of the regular or volunteer army not serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and the Territory of Alaska, could be paid extra duty pay from May 26, 1900, in accordance with the usual regulations and appropriation laws governing such payments. Card 6322, *June, 1900.*

1345. *Held*, in view of the provisions of Circular 22, A. G. O., 1898, A. R. 260, and sec. 6 of the act of April 26, 1898, that an enlisted man could not receive extra compensation for services as reporter of a court-martial. Card 7334, *November, 1899.*

<sup>1</sup>The pay of cooks enlisted since the act of March 2, 1899, is that of sergeants of infantry.

## EXTRA PAY OF VOLUNTEERS.

1346. Under the act of March 3, 1865, c. 81, s. 4, by which "officers of volunteers" in commission at its date and continuing in service to the end of the civil war were granted three months' extra pay; *held* that a certain volunteer officer duly mustered out at the end of the war was entitled to this extra allowance, although when mustered out he was under a sentence of forfeiture of pay for three months; this sentence having been evidently intended to affect his ordinary pay and not the gratuity accorded by the act. XXV, 545, *May, 1868*. But *held* that an officer of volunteers mustered out, not by reason of the cessation of hostilities at the end of the war but for the purpose of enabling him to accept a commission in the regular army, was not entitled to the extra pay.<sup>2</sup> XXI, 502, *July, 1866*. And *held* that a medical storekeeper, appointed under the act of May 20, 1862, and mustered out at the end of the war, was not entitled to the said extra pay, he having been not an officer of volunteers, but, though his tenure of office was limited to the period of the war, an officer of the regular army. XXXIV, 459, *September, 1873*.

## F.

## FINAL STATEMENT.

1347. In a case where the legality of making payment on certain transferred final statements was questioned on the ground of the alleged fraudulent enlistment of the soldier, *remarked* that the practice of allowing the final statements of a soldier to be cashed by a noncommissioned officer or other soldier, by whom they are then presented for payment, resulting, where, as in this case, the payment is questioned, in placing enlisted men in the attitude of contesting money claims with the United States, was unmilitary and impolitic and should be discontinued. 50, 447, *December, 1891*.

1348. Where a company commander certified in the usual form to the correctness of the final statement of a soldier of his company, in which statement such soldier was erroneously given credit for an amount of detained pay not actually due him, and upon which he was

<sup>1</sup> For the latest statutes respecting extra pay upon muster out of both officers and enlisted men of U. S. Volunteers, see act of January 12, 1890 (30 Stats., 784), and Army Appropriation Acts, approved March 3, 1890, and May 26, 1900.

<sup>2</sup> Compare *United States v. Merrill*, 9 Wallace, 614.



thereupon paid such amount by the paymaster, *held*, in view of par. 736, A. R. (1889), that the company commander was accountable for the amount thus wrongfully paid and lost to the United States.<sup>1</sup> 50, 358, November, 1891.

1349. Where the company commander who certified to the final statements of a soldier of his company neglected to have debited against his account therein an amount of thirty dollars due by the soldier as the purchase money of his discharge, so that this amount was not in fact collected from the soldier, *held* that the officer was chargeable with the amount thus lost by his neglect. 65, 375, July, 1894.

1350. Where a discharged volunteer soldier made out fraudulent final statements and presented the same to a paymaster for payment, *advised* that the matter be referred to the Department of Justice, that the man might be proceeded against under Sec. 5438, Rev. Sts. Card 7284, November, 1899.

1351. Where a discharged soldier regularly assigned his final statements which upon presentment for payment were found to call for more than was in fact due, *held* that the difference between the amount paid and the amount erroneously called for on the final statement could be made the subject of a claim against the discharged soldier, the assignor, but not against the United States. The man having reenlisted, it was further *held* that a stoppage against his pay to satisfy the claim above referred to would be a stoppage to satisfy a private claim and therefore not authorized. Card 8355, June, 1900.

#### FINDING.

1352. The finding of the court should be governed by the evidence, considered in connection with the plea. Where no evidence is introduced, the general rule is that the finding should conform to the plea. XXXVII, 409, March, 1876; XXXVIII, 188, July, 1876. But where an accused pleads guilty to the specification and not guilty to the charge, the question submitted to the court is whether the facts alleged in the specification sustain the charge as a matter of law, and in such a case the court may find guilty of both charge and specification. 49, 471, October, 1891.

1353. The finding on the charge should be supported by the finding on the specification (or specifications), and the two findings should be consistent with each other. A finding of guilty on the charge would be quite inconsistent with a finding of not guilty, or guilty without

<sup>1</sup>Note that A. R. 654 of 1895 (736 of 1901), contains the provision (not in A. R. 736 of 1889) that "the disbursing officer cannot protect himself in an erroneous payment made without due care by charging lack of care against the officer who gave the certificate."



attaching criminality, on the specification. So, a finding of guilty upon a well pleaded specification, apposite to the charge, followed by a finding of not guilty either of the offence charged or some lesser offence included in it (see § 1359, *post*), would be an incongruous verdict. IV, 275, *October, 1863*. No matter how many specifications there may be, it requires a finding of guilty or not guilty on but one specification (apposite to the charge) to support a similar finding upon the charge. IX, 90, *May, 1864*.

1354. There should be a separate and independent finding upon each charge and specification, and each separate finding should cover the charge or specification as to which it is made; so that if any charge or specification is deemed by the court to be proved only in part, the finding shall show specifically what is found to be proved and what not. V, 398, *February, 1865*; XVI, 73, *April, 1865*.

1355. It is a peculiarity of the finding at military law, that a court martial, where of opinion that any portion of the allegations in a specification is not proved, is authorized to find the accused guilty of a part of a specification only, *accepting* the remainder; or, in finding him guilty of the whole (or any part), to *substitute* correct words or allegations in the place of such as are shown by the evidence to have been inserted through error. And provided the exceptions or substitutions leave the specification still appropriate to the charge and legally sufficient thereunder, the court may then properly find the accused guilty of the charge in the usual manner. XXIII, 188, *August, 1866*.

1356. It is not competent for a court martial to find an accused not guilty of the specification, and yet guilty of the charge, where there is but one specification. By finding him not guilty of the specification they acquit him of all that goes to constitute the offence described in the charge. Where the court believe that the accused is guilty of the charge, but not precisely as laid in the specification, they should find him guilty of the latter with such exceptions or substitutions as may be necessary to present the facts as proved on the trial, and then guilty of the charge. V, 576, *January, 1864*.

1357. Familiar instances of the exercise of the authority to *accept* and *substitute* in a finding of guilty occur in cases where, in the specification, the name or rank of the accused or some other person is erroneously designated, or there is an erroneous averment of time or place, or a mistaken date, or an incorrect statement as to amount, quantity, quality, or other particular, of funds or other property, &c. XIII, 398, 402, *February, 1865*; XIV, 228, *March, 1865*; XXVI, 435, *February, 1868*.

1358. In finding guilty upon a specification, to except from such finding the word or words which express the *gravamen* of the act as

charged and found, is contradictory and irregular. As, from a finding of guilty on a specification to a charge of fraud under Art. 60, to specially except the word "fraudulent" or "fraudulently," while at the same time finding the accused guilty generally upon the charge. XI, 41, 44, 81, *October, 1864*.

1359. The practice of making exceptions and substitutions in the findings is well illustrated by the finding—authorized at military law when called for by the evidence<sup>1</sup>—of a *lesser kindred offence included as a constituent element in the specific offence charged*.<sup>2</sup> Of this form of verdict the most familiar instance is the finding of guilty of absence-without-leave under a charge of desertion. A full acquittal of desertion includes, of course, an absence-without-leave involved in it; but where the evidence falls short of establishing a desertion but shows an unauthorized absenting of himself by the accused, he may and should, be convicted of absence-without-leave, as his actual offence. In arriving at this conclusion, the findings on the specification and charge should be consistent, and the finding on the former should be such as to support the latter. In their finding of guilty upon the specification, the court should in terms *except* from its application such words of the specification as allege or describe desertion exclusively, and substitute words describing the lesser offence; the words "did desert," for example, being excepted, and the words "did absent himself without authority" being substituted. The finding on the charge should regularly be "not guilty, but guilty of absence-without-leave."<sup>3</sup> VII, 357, 616, 634, *March and May, 1864*; IX, 24, 26, 46, 49, *May, 1864*; XIII, 655, *May, 1865*.

1360. But the authority to find guilty of a minor included offence, or otherwise to make exceptions or substitutions in the finding, cannot justify the conviction of the accused of an offence entirely separate and distinct in its nature from that charged. Thus *held* that it was not a finding of a lesser included offence to find the accused guilty merely of absence-without-leave under a charge of a violation of the 42d Article of War in abandoning his post before the enemy. XI, 274, *December, 1864*. And so *held* of a finding, under a charge of a violation of Art. 39, of not guilty but guilty of a violation of Art. 40. XI, 276, *December, 1864*. So, where a soldier charged with "conduct to the prejudice of good order and military discipline," in concealing the fact that a fellow soldier had appropriated to his own use certain public

<sup>1</sup>See 13 Opins. At. Gen., 460.

<sup>2</sup>Compare *Reynolds v. People*, 83 Ill., 479, and note the similar authority given in criminal cases in the United States courts, by Sec. 1045, Rev. Sta.

<sup>3</sup>A simple finding, however, of guilty of absence without leave, though an irregular form, would amount in law to an acquittal of the higher offence charged. Compare *Morehead v. State*, 34 Ohio St. 212; and see § 1003, *ante*.

property, was found not guilty of the specification as laid, but guilty of "having stolen the property himself" and guilty of the charge, and was accordingly sentenced to imprisonment. *held* that such a finding was manifestly unauthorized. Having been found not guilty of the offence set forth in the specification and which alone he was called upon to answer, he should have been acquitted on both charge and specification: the offence of which he was found guilty was not alleged against him, and not being *included* in that charged, could not properly form the subject of a finding. The remission of his sentence therefore *recommended*. XXXIV, 569, *October, 1873*.

1361. It is a further peculiarity of the finding at military law that, where an accused is charged with "conduct unbecoming an officer and a gentleman," or with any specific offence made punishable by the Articles of War, and the court is of opinion that while the material allegations in the specification or specifications are substantially made out, they do not fully sustain the charge as laid but do clearly establish the commission of a neglect of military duty or a disorder in breach of military discipline as involved in the acts alleged, the accused may properly be found guilty of the specification (or specifications) and not guilty of the charge but guilty of "conduct to the prejudice of good order and military discipline." (See § 1363, *post*.) Such a form of finding is now common in our practice, especially where the charge is laid under Art. 61, and its legality is no longer questioned. V, 265, *November, 1863*; IX, 656, *September, 1864*; XI, 87, *November, 1864*; XXIX, 299, *October, 1869*; 84, 193, *March, 1894*.

1362. The authority thus to find, however, has not been extended beyond the case indicated in the last paragraph: the *reverse*, for example, of this form of finding, has never been sanctioned. A finding of guilty of a certain *specific* offence, under a charge of another specific offence, or under a charge of "conduct unbecoming an officer and a gentleman," or of "conduct to the prejudice of good order and military discipline," would be wholly irregular and invalid. Thus a finding of guilty of disobedience of orders (or of a violation of Art. 21) under a charge of mutiny in violation of Art. 22, or a finding of drunkenness on duty (or of a violation of Art. 38) under a charge for a drunken disorder laid under Art. 62 or 61, would be not only unauthorized but now almost unprecedented, and, if such a finding were made, it could scarcely fail to be formally disapproved. And so of a finding of "conduct unbecoming an officer and a gentleman" under a charge of "conduct to the prejudice of good order and military discipline." XI, 274, *December, 1864*; XVI, 532, *September, 1867*.

1363. The general finding of "conduct to the prejudice," &c., in the cases indicated in § 1361, *ante*, is sanctioned in order to prevent a failure

of justice, not for the purpose of relieving the accused of any of his due share of culpability. It should not therefore be resorted to where the specific offence charged is substantially made out by the testimony. Thus in a case where the facts set forth in the specification to a charge of "conduct unbecoming an officer and a gentleman," and clearly established by the evidence, fixed unmistakably upon the accused dishonorable behavior compromising him officially and socially, *held* that a finding by the court that he was guilty only of "conduct to the prejudice of good order and military discipline" should not be approved; in such a case the court should be reconvened for the purpose of inducing, if practicable, a finding in accordance with the facts and with justice. XXX, 495, *July, 1870*.

1364. Where, upon the finding, the vote on a charge or specification is *tiéd*, the accused is, in law, found not guilty thereon; a majority vote being necessary to any conviction. XXXI, 610, *August, 1871*; XXXII, 126, *November, 1871*; XLV, 334, *June, 1882*; Card 2003, *January, 1896*. A statement in the record to the effect that the vote upon a specification, &c., was a tie and that the accused was therefore acquitted, is of course irregular and improper. XXXII, 126, *supra*.

1365. It is an important part of the judgment of the court, in a case where the evidence is conflicting, to determine the measure of the credibility to be attached to the several witnesses. In its finding, therefore, the court may, in connection with the testimony, properly take into consideration the appearance and deportment of the witnesses on the stand, and their manner of testifying especially when under cross-examination.<sup>1</sup> XXX, 383, 447, *May and June, 1870*.

1366. In a case where a court-martial made such exceptions and substitutions in its finding upon the specification to a charge of "Forgery to the prejudice of good order and military discipline" as to negative the material allegation of false writing, *held* that there was no legal basis for the finding arrived at of guilty of the charge. 31, 117, *March, 1889*.

1367. *Held* that a finding, under a charge of desertion, of not guilty of desertion but guilty of a violation of the 40th Article of War, was not allowable and should be disapproved; the offence made punishable by that article—quitting guard, &c.—not necessarily being or involving an absence-without-leave in the military sense, and the finding not being necessarily a conviction of the absence-without-leave contained in desertion. LVII, 22, *October, 1888*.

<sup>1</sup> See § 2232 *post* and compare *Callanan v. Shaw*, 24 Iowa, 441.

That a court cannot arbitrarily disbelieve and reject from consideration the statement, duly in evidence, of a witness, not clearly shown to have perjured himself, is held in the case of *Exams v. George*, 80 Ills., 51.



1368. Upon a proposed enactment providing that the members of courts martial be allowed, at their own request, to have their individual votes upon the finding or sentence entered upon the record, *advised* that the same be not favored by the Secretary of War. Such a proceeding would indeed relieve self-respecting members from being implicated in an unjust or irrational finding or sentence, but it would materially impair the effect of the judgment of the court if the composition of the vote were to be thrown open to scrutiny and discussion. The proceeding indeed might readily, contrary to the spirit of the 84th Article, disclose the votes of all the members—as where, in a court of nine, four requested a record of their personal votes. 63, 263, *January, 1894*.

## FINE.

1369. The only *fine* known to military law is the fine authorized to be imposed by way of *punishment* by sentence of court martial. No military commander is empowered under any circumstances to impose a fine upon an officer or a soldier. VIII, 444, *May, 1864*.

1370. A fine is distinguished from a "stoppage." The former is a *punishment* and therefore imposable only by court martial. The latter is a *charge on account*, being an enforced reimbursement, by means of a debit entered against the pay of the party on the rolls, either for an amount due the United States—as for the value of public property lost, extra clothing issued, reward paid for apprehension as a deserter, &c.—or for an amount due an individual and expressly authorized by law or regulation to be thus charged.<sup>1</sup> XXXV, 457, *July, 1874*; 38, 88, *January, 1890*.

1371. Fines adjudged by courts martial accrue to the United States. A court martial cannot impose a fine for the benefit of an individual, nor can a fine adjudged in general terms be in any part appropriated for the benefit of an individual by executive authority. VII, 52, 643 *January and May, 1864*; VIII, 632, *June, 1864*. A court martial, in sentencing a party to pay a fine, has no authority to direct the collection of the same by a provost marshal, or by any compulsory process: such a direction added in a sentence should be disregarded as mere surplusage. VIII, 208, *April, 1864*.

1372. An officer on trial applied to have certain witnesses summoned from a distance and a continuance granted to await their appearance. To this the court consented on his making an affidavit setting forth material matter expected to be established by the witnesses. When these appeared it was found that they could give no material testimony

<sup>1</sup> See par. 1390, Army Regulations 1508 of 1901, and § 79, *ante*.



upon the points indicated in the affidavit. The court, in making up its sentence upon conviction, proposed to impose upon the accused (in connection with imprisonment) a *fine* of two hundred dollars as the estimated cost to the Government of procuring the attendance of the said witnesses. *Advised* that the facts stated did not constitute a proper basis for the imposition of such fine as a punishment for the offence for which the officer was convicted. His conduct in the matter, if deemed so culpable as to constitute a military offence, should be made the subject of a separate charge to be investigated on a separate trial. XXIX, 329, *October, 1869*.

1373. Where an officer, sentenced (in connection with dismissal) to the payment of a fine and to imprisonment till the fine was paid and held for some time in confinement by reason of the non-payment of the fine, applied to be released, *suggested* that, in order to protect the Government from fraud, the procedure prescribed by Sec. 1042, Rev. Sts., in cases of "poor convicts," imprisoned under sentences of United States courts, be in substance followed, before exercising any clemency in his case. XXXIV, 329, *June, 1873*.

#### FLAG OF TRUCE.

1374. The use of flags of truce by the enemy during the civil war was recognized as a belligerent right.<sup>1</sup> But the admission by flag of truce within the lines of the U. S. army in time of war of persons coming from the lines of an enemy cannot entitle such persons to immunity from subsequent inquiry into their character and business, or from restraint and detention upon reasonable grounds of suspicion appearing against them. Moreover a flag of truce does not operate as a *safe-conduct*, allowing the party admitted under it a free passage through the territory or a dispensation from the legal effects of war, but affords him a merely temporary protection not to be continued after the immediate mission of the flag has been accomplished. V, 193, *October, 1863*; VI, 434, *October, 1863*; VIII, 612, *June, 1864*. So held that a person who, during the war of the Rebellion, availed himself of a flag of truce to enter our lines for an illegal purpose, was in no degree protected by the flag from liability to arrest upon his purpose becoming apparent, or from amenability to trial and punishment for any overt act in violation of the laws of war.<sup>2</sup> XIX, 673, *July, 1866*.

<sup>1</sup> *Williams v. Bruffy*, 6 Otto, 176, 187.

<sup>2</sup> See Instructions relative to the dispatch and reception of Flags of Truce, prepared in the Judge-Advocate-General's Office, published in G. O. 43, A. G. O. 1893.

## FOREIGN SERVICE.

1375. In the absence of express authority from Congress, an officer of the army cannot accept remuneration from a foreign power in return for military or other public service rendered, without a violation of Art. I, Sec. 9, par. 8, of the Constitution. Nor can such an officer (in the absence of such authority) properly be granted a leave of absence for the purpose of rendering foreign service, even without compensation, since such a proceeding would be contrary to the spirit and intent of the laws relating to the army which clearly contemplate that the services of its officers shall be rendered to the United States.<sup>1</sup> XXXVII, 448, *April, 1876*.

## FORFEITURE—BY OPERATION OF LAW.

1376. The forfeitures of pay, &c., incurred by deserters under army regulations (see DESERTION), need not be adjudged in the sentence imposed upon the offender.<sup>2</sup> Such forfeitures attach by operation of law independently of conviction or sentence, and any reference to the same in the sentence by the court must be surplusage. VII, 207, *February, 1864*; L, 421, *June, 1886*; 49, 150, *September, 1891*; Card 4937, *September, 1898*.

1377. A forfeiture by operation of law cannot be the subject of remission. XXXII, 390, *March, 1872*. An amount duly forfeited by desertion under army regulations, when paid into the Treasury, cannot be withdrawn except by the authority of Congress. XXXVIII, 618, *June, 1877*.

1378. A soldier sentenced to dishonorable discharge only, being discharged by way of punishment for an offence, forfeits his travel pay under Sec. 1280, Rev. Sts., by operation of law, and any retained pay due him would, under Sec. 1281, Rev. Sts., as construed by par. 1269, A. R. (1895), be likewise forfeited. Card 3608, *November, 1897*.

## FORFEITURE BY SENTENCE.

1379. A court martial, in forfeiting pay by sentence, should so fix the amount to be forfeited that the same will clearly and unmistakably appear from the sentence itself without a reference to any order or

<sup>1</sup> Note in this connection the opinion of the Attorney General, in 15 Opins., 187, to the effect that the Centennial Commissioners appointed by the President under the act of March 3, 1871, were officers of the United States, holding offices of *trust*, (though, in the absence of salary, not of *profit*), and that therefore, in view of the prohibition of Art. I, Sec. 9 par. 8 of the Constitution, they could not, without the authority of Congress, legally accept presents from a foreign government.

<sup>2</sup> See C. S. v. Landers, 2 Otto, 77, 79, 13 Opins. At. Gen., 188, 199.

other source of information being necessary. So *held* that a sentence which required a soldier to forfeit an amount of pay sufficient to reimburse the United States for the value of certain property appropriated by him, without fixing the value of such property, was irregular, and might properly be disapproved unless corrected by the court on being reassembled for a revision.<sup>1</sup> XXXVII, 186, *October, 1868*.

1380. Pay cannot be forfeited (in a sentence) by implication. If the court intends to forfeit pay, the penalty of forfeiture should be adjudged in express terms in the sentence.<sup>2</sup> No other punishment, impossible by court martial—neither a sentence of death, dismissal, suspension, dishonorable discharge, nor imprisonment—involves *per se* a forfeiture or deprivation of any part of the pay or allowances due the party at the time of the approval or taking effect of the sentence.<sup>3</sup> V, 409, *December, 1863*; XVI, 676, *November, 1865*; XXVIII, 338, *January, 1869*; XXX, 52, *September, 1869*; XXXII, 236, *January, 1872*; 54, 192, *June, 1892*; 62, 340, *November, 1893*. Nor can pay (other than "retained pay") be forfeited by any misconduct of a soldier, however grave (other than desertion or absence without leave), unless he is brought to trial and expressly sentenced to forfeiture for the same. XXXIX, 413, *February, 1878*.

1381. A sentence forfeiting "pay" or "pay and bounty" does not affect the right of the accused to a pecuniary "*allowance*"—as, for example, an allowance due him for clothing not drawn. XXI, 546, *July, 1866*.

1382. Clothing issued to a soldier and charged to his clothing account becomes his personal property subject to its use in the military service and ceases to be an allowance subject to forfeiture by sentence of a court-martial. Card 3251, *June, 1897*.

1383. A sentence of forfeiture of "all pay and allowances" includes and forfeits "extra duty pay." XXXIV, 446, *September, 1873*.

1384. Pay forfeited by sentence of court martial can accrue to the United States only. A sentence cannot forfeit (appropriate, or "stop") pay for the reimbursement or benefit of an *individual*, civil or military, however justly the same may be due him, either for money

<sup>1</sup> Compare case in G. C. M. O. 65, Dept. of Dakota, 1880.

<sup>2</sup> Compare *Elliott v. Railroad Co.*, 9 Otto, 573.

<sup>3</sup> This principle is well illustrated by the opinion of the Attorney General 13 Opins., 103, concurring with an opinion of the Judge-Advocate General in the case of Major Hensel, where it was held that the fact that the accused had been sentenced to death on conviction of murder did not affect his right to his pay from the date of his arrest to that of the final action taken on the sentence by the President. And see the more recent opinion of the Attorney General of November 9, 1876 (15 Opins., 175), to the effect that the pay of officers and seamen of the navy is not divested by the operation of sentences of imprisonment or suspension, but only when forfeited in specific and express terms in the sentence.

borrowed, stolen, or embezzled by the accused, or to satisfy any other pecuniary liability of the accused whether in the nature of debt or damages; nor can a sentence forfeit pay for the support or benefit of the family of the accused, or for the benefit of a company fund, post fund, hospital fund, &c., none of these funds being money of the United States.<sup>1</sup> All forfeitures by sentence, whether or not so expressed to be in terms, are to be understood and treated as forfeitures to the United States, accruing to the general treasury.<sup>2</sup> II, 54, *March, 1863*; VI, 177, IX, 240, 257, 275, *June, 1864*; XIII, 91, *December, 1864*; 549, *April, 1865*; XVI, 322, *June, 1865*; XXVII, 422, *December, 1868*; 450, *January, 1869*; XXIX, 535, *December, 1869*; XXX, 54, *October, 1869*; LIII, 2, *September, 1886*.

1385. Where a sentence imposes a forfeiture of the "monthly" pay, or a part of the "monthly" pay of a soldier, for a designated number of months, the sum forfeited is the amount indicated multiplied by the number of months. Thus where the sentence of a soldier imposed a confinement for eight months with a forfeiture of eight dollars of his monthly pay for the same period, the sum forfeited was not eight but sixty four dollars.<sup>3</sup> XXXIV, 173, *March, 1874*.

1386. Where the sentence is confinement for a certain number of months or years, with a forfeiture of pay "for the same period," the execution of the forfeiture properly begins with the term of the confinement. XXX, 500, *July, 1870*. The sentence in such a case imposes two distinct and independent punishments. The remission therefore of an unexecuted portion of one would not affect the other. XXXVIII, 329, *October, 1876*; 45, 287, *February, 1891*; Card 1780, *October, 1895*.

1387. A forfeiture of a soldier's pay, not limited by the sentence to the pay of any particular designated month or months or other space of time, but expressed, as such forfeitures usually are, simply as a forfeiture of a certain number (as three, six, &c.) of months' pay or of a certain amount of pay (as ten, twenty or more, dollars of his pay), is legally chargeable against the pay due and payable to the soldier at the next pay day after the promulgation of the approval

<sup>1</sup> But as the post exchange, company, and similar funds are agencies or instrumentalities of the Government, the pay of officers and soldiers may be stopped without sentence to reimburse these funds. See §§ 1424-1427, 2384, and note to 2014, *post*.

<sup>2</sup> Soldiers' pay forfeited by sentence to the United States was, by the act of March 3, 1851 (see, 4818, Rev. Stat.), appropriated for the support of the Soldiers Home. This appropriation, as here expressed, is of "All stoppages or fines adjudged against soldiers by sentence of courts martial, over and above any amount that may be due for the reimbursement of Government, or of individuals." The "individuals" here intended were no doubt sutlers and landresses, or other persons (including perhaps the class for whom "reparation" is provided by Art. 54) to whom a lien on soldiers' pay may be given by statute or regulation.

<sup>3</sup> See opinion of the Judge-Advocate General published in G. O. 421, War Department, 1874; also A. R. 951 (1052 of 1901).



of the sentence, and, if no pay is then due or that due is not sufficient to discharge the forfeiture, against the pay due and payable at successive pay days till the entire forfeiture is satisfied. XXXVII, 563, *May, 1876*; XXXVIII, 662, *July, 1877*; XXXIX, 537, *August, 1878*. The forfeiture, upon the promulgation and notice to the party of the approval of the same, becomes a debt due to the United States and may legally constitute a charge against the pay then due the party, if any, and be satisfied as far as practicable out of such pay when payable, viz., at the pay day next succeeding the promulgation of the approval or of the noting of the approved forfeiture on the muster-for-pay rolls.<sup>1</sup> XXXIX, 266, *November, 1877*.

1388. Whether, in a case of a non-commissioned officer having pay due him and sentenced to reduction and forfeiture of pay, the forfeiture should be satisfied out of his pay as non-commissioned officer or out of his pay as private after the reduction will properly depend upon the intention of the court, if the same can be gathered from the terms of the sentence. But where a sergeant to whom a month's pay was overdue, was sentenced "to be reduced to the ranks, forfeiting three months' pay," *held* that this forfeiture, upon the approval of the sentence, created a debt to the United States which might legally be satisfied out of the pay of the soldier as a sergeant so far as the same would go, and, as to the balance, out of his pay as a private.<sup>2</sup> XXX, 419, *June, 1870*.

1389. Where a soldier was sentenced to be dishonorably discharged and to forfeit all his pay except twenty dollars, and, upon his discharge, it appeared that he was indebted to the United States in a greater amount, *held* that the excepted sum could not legally be rendered to him.<sup>3</sup> XXXVII, 488, 602, *April and June, 1876*.

1390. Where a soldier was sentenced to a forfeiture of ten dollars per month of his pay for eighteen months, and his term of enlistment expired before the end of that time, *held* that he could not legally be retained in the service beyond such term, for the purpose of the full execution of the forfeiture. XVI, 94, *May, 1865*.

1391. Where a soldier was sentenced to a forfeiture of three months' pay, but his term of enlistment expired in about two months after the approval of the sentence so that one third of the forfeiture remained unexecuted, *held*, on his subsequently re-enlisting, that this balance could not legally be stopped against his pay; the second enlistment

<sup>1</sup> In practice, however, such forfeitures are charged only against pay accruing *subsequent* to the date of the order promulgating the sentence. See G. O. 33, Hdqrs. of Army, 1878; par. 951 A. R. of 1885 (1052 of 1901).

<sup>2</sup> But see preceding note.

<sup>3</sup> See G. O. 33, A. G. O., 1878; also A. R. 953 of 1885 (1054 of 1901).



being a new and independent contract and the party contracting not being subject to a liability attaching to the distinct status occupied by him under a previous contract. XXXVIII, 662, *July, 1877*.

1392. Where a soldier was sentenced to a forfeiture of his pay for six months, but soon after the approval of his sentence was honorably discharged from the service (under Art. 4), *held* that the discharge operated as a remission of the unexecuted part of the forfeiture, and that the same was not revived upon a re-enlistment. L, 501, *July, 1886*.

1393. Where an officer was sentenced to be dismissed with forfeiture of pay due, and, subsequently to the approval of the sentence but before such approval had been promulgated to the army or the officer had been officially notified of the same, he applied for and received the pay due him, *held* that inasmuch as the forfeiture had not taken effect at the time of the payment no illegal act was committed by the officer, and that the paymaster who paid him was not properly to be held accountable for the amount paid. X, 609, *November, 1864*. So where a soldier in confinement awaiting the result of his trial by court martial was, contrary to A. R. 945 (1046 of 1901), paid one month's pay, it was *held* that his title thereto became thereupon vested and was unaffected by the sentence of forfeiture of all pay and allowances subsequently published in his case. Card 3258, *June, 1897*.

1394. In a case of a forfeiture, by sentence, of "pay due" (or "pay due and to become due"), the amount of pay due and payable to the party at the date of the approval of the sentence is, in contemplation of law, returned from the appropriation for the army to the general treasury and becomes public money, and, being in the Treasury, cannot, without a violation of Art. I, Sec. 9, par. 7, of the Constitution, be withdrawn and restored to the party, except by the authority of Congress. XXIII, 642, 659, *August, 1867*; XXVIII, 63, *August, 1868*; 567, *May, 1869*; XXIX, 139, *July, 1869*.

A sentence forfeiting pay can be remitted only as to pay not due and payable at the date of the remission. I, 393, *October, 1862*; VIII, 392, 576, *June, 1864*; IX, 196, *May, 1864*; X, 676, *December, 1864*; XXXV, 372, *May, 1874*; L, 221, *April, 1886*; 34, 334, *August, 1889*. Where a soldier's pay has been forfeited by an executed sentence, no mere amendment of the muster-roll upon which the same has been noted can operate to undo such forfeiture. XXX, 44, *September, 1869*. If however the sentence was in fact illegal and void, the soldier should be credited on subsequent rolls with the forfeiture as having been illegally collected and the amount refunded to him. Card 5392, *November, 1898*.

1395. In executing a sentence of forfeiture of pay, the pay forfeited, in the absence of specific statutory authority for the purpose, cannot be diverted from the general treasury to any particular fund. Thus where a soldier convicted of the embezzlement of certain subsistence stores was sentenced to a forfeiture of pay, *held* that the Secretary of War would not be authorized to cause the pay forfeited to be added to the appropriation for the Subsistence Department so as to make good to the same the amount lost by the embezzlement. XLIII, 85, *November, 1879.*

1396. Where a soldier, on enlisting, was paid an amount of money as *local bounty*, and this money, under an existing regulation of the Provost Marshal General's Office, adopted with a view to prevent desertion and for the safekeeping of the funds, was taken from the possession of the soldier by the military authorities, and the soldier presently deserted and was subsequently apprehended and brought to trial, *advised* that the court was not authorized to forfeit this money by its sentence: the same being private property of the soldier held by the authorities, not as money due him by the United States but as a special bailment and trust for his personal benefit. XXII, 642, *March, 1867.*

1397. A sentence of dishonorable discharge only, does not carry with it forfeiture of pay and allowances (except travel allowances which are forfeited by operation of law under Sec. 1290, Rev. Sts.) due at date of the discharge. 56, 329, *November, 1892*; Card 3608, *November, 1897.*

1398. A forfeiture of "pay" only, does not affect *allowances*. Thus a sentence to forfeit "all pay now due or to become due," though it includes retained pay, does not forfeit money due on clothing account. XLIX, 526, *December, 1887.*

1399. A forfeiture of pay "now due" means, under existing army regulations, due at the date of the promulgation of the approved sentence. L, 421, *June, 1886*; 46, 8, *March, 1891.* Pay which is not due cannot be forfeited by a sentence purporting to forfeit only pay which is due. 64, 5, *February, 1894.*

1400. When the proceedings of general courts martial were promulgated in general court martial orders no difficulty was experienced in making the date of the order the same as the date of the action of the reviewing authority. This is often not practicable when the promulgation is in special orders. As the sentence should commence on the date of the action thereon by the reviewing authority, this date should appear in the order of promulgation. Amendment of the existing regulation on the subject recommended.<sup>1</sup> Card 1681, *August, 1891.*

<sup>1</sup> See pars. 945 and 951, A. R. of 1895 (1040 and 1052 of 1901).

1401. Forfeiture by sentence of a summary court is operative only on pay accruing after approval of the sentence unless otherwise specified in the sentence. Card 2791, *December, 1896*.

1402. In a sentence of forfeiture of "all pay due" (or "all pay now due"), imposed with dishonorable discharge, to add "or to become due" would give no further effect to the sentence. Otherwise where forfeiture is adjudged alone, unaccompanied by dishonorable discharge; there the term "or to become due" would forfeit pay falling due after the date of the promulgation of the approval and while the soldier remained in service. 46, 8, *March, 1891*.

1403. A sentence "to be dishonorably discharged from the service of the United States, forfeiting all pay and allowances," has the same meaning that it would have if the words "due him" were added after the word "allowances." Card 3009, *March, 1897*.

1404. A forfeiture remitted upon approval does not take effect. So where a forfeiture of pay adjudged a deserter was, upon the approval of his sentence, remitted by the reviewing authority, *held* that he was entitled to pay from the date of his arrest or surrender and return to military control—the date at which a deserter (A. R. 131; 142 of 1901) is "considered as again in service," or rather resumes his service. L, 317, *May, 1886*.

1405. Where a soldier was sentenced "to be dishonorably discharged, forfeiting all pay and allowances, and to be confined for three months," and the dishonorable discharge was remitted in approving the sentence, *held* that the forfeiture was evidently intended to relate to pay due at the date of discharge, and that, as the discharge had been remitted, the forfeiture could apply only to pay due at the date of the receipt at the post of the order publishing the sentence. LI, 176, *December, 1886*.

1406. Where a sentence of forfeiture of ten dollars per month for a certain number of months was remitted thirteen days after promulgation, *held* that the forfeiture not affected by the remission was to be executed by stopping against the soldier's pay the thirtieth part of ten dollars for each and every day prior to the remission. LV, 227, *December, 1887*.

1407. As prescribed in paragraph 952, A. R. (1051 of 1901), an order remitting a forfeiture of pay operates only on the pay which becomes due subsequent to the date of the order; in other words the regulation is based upon the assumption that the forfeiture becomes fully executed each day as to that day's pay. Card 2332, *June, 1896*; 5411, *December, 1898*; 5883, 5898, *February, 1899*; 6311, *April, 1899*.

1408. Where a forfeiture of ten dollars per month for three months

<sup>1</sup> See Circular 6, A. G. O., 1897.

was imposed upon a soldier (in the first year of his enlistment), *held* that this could not be executed by forfeiting thirty dollars in one sum when so much had aggregated as pay due, but that, as his available monthly pay was nine dollars only (four dollars being *retained* under the act of June 16, 1890), the execution would be best managed by remitting one dollar for each month included in the sentence. 63, 54, *December, 1893.*

1409. Pay for a certificate of merit, like pay for continuous service, has always been held to be a part of the soldier's pay and as such subject to forfeiture by sentence of a court martial. Card 1308, *April, 1895.*

#### FORGERY.

1410. A disbursing officer who pays out money of the United States upon vouchers that are forged will in general make himself liable for the amount paid. Thus where such an officer paid out public money upon transportation requests, addressed to a railroad company and accepted by it, which requests had been fraudulently prepared by a quartermaster's clerk who had forged the name of the quartermaster thereto, *held* that the disbursing officer was responsible for the amount paid. 58, 208, *October, 1892.*

1411. A paymaster drew his check in favor of a discharged soldier for the amount due him on final settlement. The payee endorsed the check in blank, and the paymaster then, according to a common practice, sub-endorsed it, adding his official designation, merely for the purpose (though the endorsement did not so state), of identifying the signature of the payee. The writing in the body of the check was then removed or altered and the check filled in for a very much greater amount. The check thus raised was on the next day presented to and paid by the Assistant Treasurer at New York. *Held* that, while, in the hands of a *bona-fide* endorsee, the liability of the paymaster would have been that of a regular endorser, parol evidence not being then admissible to show that he endorsed merely for identification,<sup>1</sup> yet the loss in this case legally fell upon the Assistant Treasurer whose liability was the same as that of a bank which pays a forged check in a case in which the forgery has not been facilitated by the negligence of the drawer.<sup>2</sup> 53, 312, *May, 1892.*

#### FRAUDULENT ENLISTMENT.

1412. This offence (constituted and made punishable as a violation of Art. 62, by the act of July 27, 1892, c. 272, §. 3) is defined in

<sup>1</sup> Daniel on Negotiable Instruments, vol. 1, p. 719, and cases cited.

<sup>2</sup> Byles on Bills (Stanswood's edition), 337, and cases cited.



Circ. No. 13, A. G. O. 1892.<sup>1</sup> The misrepresentation or concealment characterizing it must have induced the enlistment of the soldier and must have related to a fact which if known would have caused his rejection. Where the offence consisted in his having concealed the fact that he had been discharged with a questionable character—viz., "very good except when intoxicated, then bad"—*held* that such offence was chargeable as "fraudulent enlistment," provided the knowledge of this fact on the part of the recruiting officer would have prevented the enlistment. 63, 153, *January, 1894*.

1413. A fraudulently enlisting soldier, may be disposed of in either of two ways, *viz.*, he may be brought to trial for his offence under the statute, or he may be discharged "without honor." If brought to trial and convicted, and his sentence does not include dishonorable discharge (as it need not do under the order prescribing a maximum punishment for this offence), *held* that the Government could not properly also summarily discharge him. While it might have resorted to either course, it would scarcely be just to subject the offender to both. 60, 174, *June, 1893*.

1414. The enactment of the law making fraudulent enlistment a military offence, did not take it out of the law of contracts. Fraudulent enlistment has a two-fold character—criminal and civil. In the latter character it is a fraudulent contract which may be avoided, and when a contract is avoided for fraud, the party committing the fraud has no right to the benefits of the contract. Paragraph 1519, A. R. (1386 of 1895; 1564 of 1901) simply carries out this principle. It is therefore legal under this regulation to summarily discharge a fraudulently enlisted soldier with loss of all pay and allowances, instead of bringing him to trial. 58, 318, *March, 1893*.

1415. A fraudulent contract of enlistment is not void but voidable only at the option of the Government. The Government, on becoming cognizant of the fraud, may avoid the contract, or waive the objection and allow it to stand—in which latter case the accepted service is as legal as that of any other soldier. Where the fraudulent character of an enlistment contract did not become known until after a part of it had been executed, *held*, that while the same, as to its unexecuted portion might legally then be avoided and terminated, yet, as to the part executed, it was a valid contract, and the soldier could not lawfully be required to refund money paid for that part. 55, 183, *August, 1892*; Cards 355, 359, *September, 1894*; 494, *October, 1894*; 1624, *August, 1895*; 2022, *January, 1896*; 2717, *November, 1896*; 6398, *May, 1899*.

1416. There is a distinction between a fraudulent contract of enlist-

<sup>1</sup>See Court-Mar. Manual—1901, page 14, note 4.



ment and the character of service thereunder. While the former is voidable at the option of the Government, the service is legal service and, if the contract be not avoided on account of the fraud, the soldier would be entitled to such a discharge upon completion of his term as his services may merit. And if the discharge is an honorable one, it should in general be viewed as establishing the fact that the service referred to therein was honest and faithful. Card 6406, *May, 1899*.

1417. Before fraudulent enlistment was made a military offence by the act of July 27, 1892, it was held that persons fraudulently enlisting (except those who were undischarged under a former enlistment) could not be tried for the fraudulent enlistment as a military offence, because when the act was done they were not in the "land forces." So in the act of 1892, receipt of pay or allowance was made part of the offence. The complete offence therefore is the entry into the service by means of a misrepresentation and the receipt of pay or allowance. The procuring of the enlistment by means of misrepresentation, &c., and not the misrepresentation itself, constitutes the offence. Card 2768, *January, 1897*; see § 312, *ante*.

1418. The act of enlisting without a discharge from a prior enlistment was punishable as fraudulent enlistment before the enactment of the legislation of July 27, 1892, there being no doubt that the soldier so enlisting is in the military service at the time of such fraudulent enlistment. In such a case it is not necessary to allege the receipt of pay or allowances. These words were inserted in the act of 1892 to meet the cases of men, not bound to service, who fraudulently enlist. It was thought that the view might be taken in such cases that the act of fraudulent enlistment was not committed in the military service and would not be sufficient, taken alone, to form the subject of a military charge.<sup>1</sup> In these cases therefore an allegation in the specification of receipt of pay or allowances is essential to properly describe the military offence of fraudulent enlistment defined and prohibited by the statute. Cards 7275, *February, 1899*; 7668, *February, 1899*.

1419. Where a soldier fraudulently enlists without a discharge from a prior enlistment, he may be brought to trial for desertion and fraudulent enlistment, or he may be restored to duty without trial and held to serve either the fraudulent enlistment or the one from which he deserted, or both, at the option of the Government. In practice, if he is held to serve only one, he is discharged without honor from the other. 49, 442, *October, 1891*; Cards 359, *September, 1894*; 2115, *March, 1896*; 4711, *August, 1898*; 5502, *January, 1899*.

<sup>1</sup> In a recent case, *In re Carver*, 103 Federal Reporter, 624 the court said: "It may well be doubted whether under the Constitution fraudulent enlistments can be made offences punishable by courts martial; but there can be no question that the receipt of pay or allowance after fraudulent enlistment may be made so punishable."

**1420.** Where a man, not a deserter from a prior enlistment, fraudulently enlists he may be allowed to serve out such enlistment or he may be discharged therefrom without honor, or brought to trial for the offence of fraudulent enlistment at the option of the Government. Cards 4797, *August, 1898*; 5481, *December, 1898*.

**1421.** Disqualifications for enlistment may be statutory and not statutory. Congress has said (act of August 1, 1894) that a man whose service during his last preceding term of enlistment has not been honest and faithful is disqualified for enlistment, and this governs all recruiting officers. But where such service has been honest and faithful, there may be disqualifications which would justify the rejection of the applicant; in short, the fact of such honest and faithful service takes him out of the class whose enlistment is prohibited by the act of August 1, 1894, but does not prevent his enlistment being fraudulent if he concealed facts in regard to other previous service, which if known would have caused his rejection. Card 7542, *January and February, 1900*.

**1422.** A deserter from the Navy of the United States who enlists in the Army by concealing the fact of such desertion, commits the offence of fraudulent enlistment and may be brought to trial therefor. 59, 91, *April, 1893*.

**1423.** The dishonorable discharge by sentence of court-martial of a soldier for fraudulent enlistment is not intended as a rescission of the contract but as a punishment for the military offence. Being discharged by way of punishment for an offence (Sec. 1290, Rev. Sts.), he is not entitled to travel allowances; but if such sentence does not provide for forfeiture of pay and allowances, he is entitled to all current pay and allowances due him at date of the discharge. Paragraph 1386, A. R. (1564 of 1901), which provides that enlisted men discharged for fraudulent enlistment shall not be entitled to pay and allowances, etc., applies only to summary discharges for fraudulent enlistment and not to discharges by court martial for fraudulent enlistment.<sup>1</sup> Card 3608, *November, 1897*.

#### FUNDS FROM SAVINGS.

**1424.** The company, hospital, and similar funds, not being public money, it was formerly held that stoppages of pay of officers and soldiers could not be made to reimburse these funds (XLVII, 151, *June, 1883*; 35, 189, *September, 1889*); but as the post exchange fund has been recognized as an agency or instrumentality of the Government,<sup>2</sup>

<sup>1</sup>The Comptroller of the Treasury held *contra* as to this regulation, in opinion dated January 28, 1898 (not published), and cited in support the case of *Fernandes*, decided Aug. 12, 1897 (4 Comp. Dec., 54).

<sup>2</sup>See extract from decision of Court of Claims, in *Dugan v. United States*, in note to § 2014, *post*.

and in view of the reasons upon which such conclusion rests, *held* that stoppages may legally be made to reimburse post exchange, company, bakery, hospital, and regimental funds. Cards 3171, *June, 1897*; 7186, *October, 1899*.

1425. Where a retired enlisted man embezzled \$240, post exchange funds, *held*, in view of the fact that such funds are recognized as an instrumentality of the Government, that his pay could legally be stopped to reimburse those funds. Card 3171, *June, 1897*.

1426. Where certain officers had misappropriated and applied to their own use \$589.08, company funds, *recommended*, that that amount be stopped against their pay. Card 7186, *October, 1899*.

1427. An officer at the time of his death was accountable for \$360 company fund. A board of survey reported that he had left in lieu of the money an undorsed government check for that amount, payable to his order and purporting to be for pay due him. It thus appeared that the officer owed the company fund \$360, and that the Government owed him the same amount for salary, the check not having been presented and paid. *Advised*, therefore, that as an officer's pay may legally be stopped to reimburse the company fund, \$360 be stopped against the pay due the deceased officer, and that the check referred to be returned to the drawer to be cancelled. Card 7957, *April, 1900*.

#### FURLOUGH.

1428. *Held* that a department commander, in acceding to the application of an enlisted man for a month's furlough, would not be authorized to make the grant conditional on his giving up or waiving one month of the three months' furlough allowed at the end of the third year of enlistment by the act of June 16, 1890, c. 426, sec. 2. The provisions of this act are based upon public policy, being devised with a view to diminishing the great evil of desertion. In this view they entitle the soldier as a right to the furlough at the time specified and to the discharge at its expiration. The policy is extended to all soldiers, and the right made absolute. It is not even declared that the furlough or discharge shall be allowed under "regulations to be prescribed;" the grant is unqualified and unrestricted. Any condition imposed by a commander would thus be in contravention of the terms and policy of the law. The furlough given a soldier, pending the term of enlistment, under par. 109 or 110, A. R. (1889), is an altogether different matter and should be considered as quite independent of the furlough provided by the act of 1890. The former furlough is in the commander's discretion under the regulations, and should be granted

on the merits of each case as a separate and distinct act and order quite irrespective of the statutory furlough that may be earned by faithful service at the end of the three years. 64, 220, *March, 1894*.

1429. Under the provisions of sec. 2 of the act of June 16, 1890, granting a three months' furlough to soldiers after three years of "faithful" service, *held* that it would not be expedient to adopt an inflexible rule that a soldier who at any prior period of his enlistment had been convicted of a military offence should be deemed ineligible to such furlough. As regards offences other than desertion, each case should properly be left to be decided upon its own merits at the discretion of the Secretary of War. 48, 20, *June, 1894*.

## G.

### GAMBLING.

1430. Gambling, *per se*, does not constitute a military offence. If indulged in, however, to such an extent or in such a manner as to give it the character of a disorder "to the prejudice of good order and military discipline" in the sense of Art. 62, or under circumstances so personally discreditable as to bring it within the description of "conduct unbecoming an officer and a gentleman," it may of course be taken cognizance of by a court martial. The Army Regulations recognize it as peculiarly objectionable when practised by a disbursing officer.<sup>1</sup> XVI, 381, *July, 1865*; XL, 32, *October, 1877*.

### GARNISHMENT.

1431. It is well settled, upon considerations of public policy, that funds in the possession of a paymaster of the army or other disbursing agent of the United States, due as pay, salary, or wages, to an officer or soldier of the army, or other government employee, cannot be attached in a suit instituted against such officer, &c., by a private creditor.<sup>2</sup> VIII, 493, *May, 1864*; XX, 413, *February, 1866*; XXVI,

<sup>1</sup> See, in G. C. M. O. 18, War Dept., 1871, a case of a disbursing officer convicted of gambling, as an offence under Art. 62; and note the remarks of the reviewing authority upon an instance of this class in G. O. 2, Dept. of Arizona, 1878. In an early case—in G. O. 104 Hdqrs. of Army, 1863—it was held that a claim by a disbursing officer that he had played for too small stakes to endanger the safety of the public funds entrusted to his charge, was not a sufficient excuse for his gambling, in view of the regulation. See par. 590, A. R. of 1895 (672 of 1901).

<sup>2</sup> *Buchanan v. Alexander*, 3 Howard, 20; *Averill v. Tucker*, 2 Cranch, C. C. 544; *Derr v. Lacey*, 1 McArthur, 187; 13 Opins. At Gen. 566. And the same principle is applied to moneys due from municipal corporations. *Hawthorn v. St. Louis*, 11 Mo. 59; *Burnham v. Fond du Lac*, 15 Wise, 211; *Wilson v. Bk. of La.*, 55 Ga. 98; *Pruitt v. Armstrong*, 56 Ala. 306; *Boone v. Kesk*, 31 Ark. 387.



466, *February, 1868*; XXVIII, 47, *August, 1868*; XXXIII, 8, *March, 1872*; XXXIV, 26, *November, 1872*; Cards 1901, *December, 1895*; 2767, *December, 1896*; 4887, *September, 1898*; 8108, *March, 1899*. Where indeed the pay due has been paid over to a third person as the authorized agent or attorney of the party entitled to receive it, it may be attached by the garnishee process in the hands of such person. Card 4887, *supra*.

1432. The principle is well established that money in the hands of a disbursing agent of the United States is not subject to attachment in a suit by a creditor of a party to whom such money is due and payable. A military disbursing officer is therefore not empowered to pay moneys in his hands, due a government contractor, to any creditor of such contractor, or to any person other than the contractor himself, or his agent or attorney or personal representative; nor can he be made liable to pay over any part of such moneys as garnishee in a suit brought against such contractor. LIV, 514, *January, 1888*.

1433. A general service clerk received from a paymaster of the army, in payment of his monthly pay, a check upon a national bank, which was a U. S. depository. On presentation the bank retained the check and refused payment on the ground that the county sheriff had levied an attachment on all the property of the payee in the bank. *Held* that such refusal was legally unauthorized. The pay due was public money in the hands of the depository, and could be paid only to the payee of the check or his order. 54, 361, *July, 1892*.

1434. A creditor of a government contractor, to whom the Government owes a balance, cannot attain the object of a foreign attachment by bringing suit against the contractor, and joining with him, as defendants, the United States, as also the officer of the army who executed the contract, and praying judgment against the United States, or for an order of court upon the officer to pay over the amount claimed. An individual cannot be allowed so to control the operations of the Government.<sup>1</sup> 40, 251, *April, 1890*.

#### GENERAL STAFF.

1435. The General Staff of the army, consisting of the chiefs of the staff corps and inferior officers of the same, constitute the Staff of

<sup>1</sup>Moreover, when suit is initiated against the United States, the plaintiff is required to promise according to the provisions of secs. 4, 5 and 6 of the act of March 3, 1887, c. 359, and must duly serve a copy of the petition upon the proper U. S. district attorney, as notice to appear and defend the interests of the United States, and mail a copy to the Attorney General, &c.—a procedure which had not been followed in this case.



the Commander-in-chief of the Army—the President.<sup>1</sup> As such, these officers are properly under the immediate direction of the Secretary of War, who acts for the President in the administration of the military department. XXXVIII, 253, *August, 1876*; XL, 17, *April, 1877*.

## H.

### HABEAS CORPUS.

1436. In a proclamation of May 10, 1861, the President authorized the commander of the U. S. forces on the Florida coast, if he found it necessary, "to suspend there the writ of *habeas corpus*." By G. O. 104, War Department, Aug. 13, 1862, the President suspended the privilege of the writ of *habeas corpus* in cases of persons liable to draft who should attempt to depart to a foreign country, or should absent themselves from the State or county of their residence, in anticipation of a draft to which they would be subject. By a proclamation of September 24, 1862, the President declared the privilege of the writ suspended in respect to all persons arrested or imprisoned "during the rebellion by any military authority," or under "sentence of any court martial or military commission." These proclamations and orders were all based upon the theory that under Art. I, Sec. 9, par. 2, of the Constitution, or otherwise, the President alone, in the absence of any authority from Congress, was empowered to suspend the privilege of the writ.<sup>2</sup> See I, 345, *September, 1862*.

But in the following year, by the act of Congress of March 3, 1863, c. 81, s. 1, it was provided: "That during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States or any

<sup>1</sup>Stoecker, *Military Dictionary*, title "General Staff," defines this term— "The body of officers entrusted with the general duties of the army in aid of a commander-in-chief." See G. O. 11 and 28, A. G. O., 1869; also two letters of Secretary of War to Lieutenant General Sheridan (5603, A. G. O. 1885) dated, respectively, Dec. 9, 1884, and Jan. 17, 1885.

<sup>2</sup>The question whether the President was authorized, in his own discretion and independently of the sanction of Congress, to exercise this power, was much discussed early in the civil war. The fullest argument in favor of the existence of the power in the President, is contained in Mr. Horace Binney's treatise on "The Privilege of the Writ of *Habeas Corpus* under the Constitution." And see also, *Ex parte Field*, 5 Blatch. 63, Opinion of At. Gen. Bates in 10 Opins. 74. The weight of judicial authority, however, was the other way. See *Ex parte Merryman*, Taney, 246; *McCall v. McDowell*, 1 Abbott, U. S. R., 212; *Griffin v. Wilcox*, 21 Ind. 383; *In re Kemp*, 16 Wise. 382; *In re Oliver*, 17 id. 703.

part thereof;"—Congress, by thus asserting the right in itself to authorize the suspension, implying that, in its opinion, the power to suspend did not reside in the President.<sup>1</sup>

In sundry particular cases, referred to the Judge-Advocate General by the Secretary of War, of persons detected in holding correspondence with, or giving intelligence or otherwise lending aid to, the enemy, as also in obstructing enlistments in the army, &c., the opinion was expressed that the suspension of the writ by the President would be legally justified under this act. II, 174, 456, *April and May, 1863*; III, 72, *June, 1863*. The instances, however, of suspension in individual cases were not numerous; for, presently, viz., on Sept. 15, 1863, and pursuant to the act of March 1863 above cited, the President issued a proclamation suspending the privilege of the writ generally, and "throughout the United States" in all cases "where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offence against the military or naval service." In a case in which, by the operation of this last proclamation, the writ was suspended, *held* that any judge or court, whether of the United States or of a State, would be required to dismiss the writ, on being advised (in the manner and form indicated in the act of March 3, 1863, s. 1) that the party sought to be relieved was "detained as a prisoner under the authority of the President." XV, 157, *May, 1865*.

1437. By a proclamation of Dec. 1, 1865, the President "revoked and annulled" the suspension (by proclamation of Sept. 15, 1863) of the privilege of the writ in certain States, including New York. *Held* that such revocation did not operate to authorize the discharge, by a court of that State, of a prisoner detained in military custody under color of the authority of the United States. XXI, 92, *December, 1865*.

1438. But, independently, on the one hand, of any proclamation or act of the President suspending the privilege of the writ, or, on the other hand, of any proclamation revoking a previous suspension, and on constitutional grounds alone, *held* that no court or judge of any State could in any instance be authorized to discharge, on *habeas corpus*,

<sup>1</sup> See *In re Murphy*, Woolworth, 141.

a person, military or civil, held in military custody by the authority of the United States. XIX, 92, *December, 1865*; XXI, 92, 133, *December, 1865*. And *held*, particularly, in regard to soldiers arrested or confined by the military authorities under a charge of or sentence for desertion,—that their discharge, upon any ground, by writ of *habeas corpus* was wholly beyond the jurisdiction of any State tribunal. II, 34, 190, 484, *February to June, 1863*; III, 104, *June, 1863*; V, 398, *December, 1863*. So *held*, in regard to persons arrested by a provost marshal as deserters for not responding to a draft in time of war. III, 457, 578, *August and September, 1863*. And further, *held* that no State court could have jurisdiction, on a proceeding for the discharge by writ of *habeas corpus* of an enlisted soldier, to pass upon the question of the legality of the soldier's enlistment, or to discharge him from his contract of enlistment, on the ground of its invalidity by reason of minority, non-consent of parent, or other cause; the authority to discharge from the restraint and obligation of the ordinary military status being considered to be governed by the same principle as that to discharge from an arrest or confinement under a military charge or sentence, or from the custody of a U. S. marshal under civil process of the United States.<sup>1</sup> XXI, 157, *January, 1866*; XXIX, 140, *July, 1869*; XXXIII, 271, *August, 1872*; 32, 313, *May, 1889*; Card 394, *September, 1894*.

1439. And *held* that a State court was not authorized to discharge on *habeas corpus* a civilian held by the authority of the United States as a convict under sentence of a military commission. XXVIII, 50, *August, 1868*.

<sup>1</sup> Opposed to this view was the opinion of Atty. Gen. Stanbery in Gormley's case (October, 1867), 12 Opins. At. Gen. 258. But in December, 1871, the ruling of the Judge-Advocate General in this class of cases was sustained by the United States Supreme Court in Tarble's Case, 13 Wallace, 397, in which the judgment of a State court, which had ordered the discharge, on *habeas corpus*, of an enlisted soldier from "the custody of a recruiting officer," was reversed on the ground that he had enlisted when under eighteen years of age and without his father's consent, was reversed as an unconstitutional assumption of authority. In applying to the case the principle laid down in Ableman v. Booth, 21 Howard, 506, the Court, by FIELD, J., observed: "State judges and State courts, authorized by laws of their States to issue writs of *habeas corpus*, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appears upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having custody of the prisoner, to give, by a proper return, information in this respect. The return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the

1440. Where a writ of *habeas corpus*, issued by a State court or judge for the relief of a person held in arrest, confinement, or under enlistment, by the military authorities, is served upon a military officer, he is not required to comply with the direction of the writ to produce before the court the *body* of the person so held. It is sufficient for him merely to make return showing clearly that such person is held by the authority of the United States as a deserter, or under a contract of enlistment, or otherwise, as the case may be.<sup>1</sup> The State court, upon being thus apprised, will properly dismiss the writ. III, 104, *June, 1863*; XXI, 157, *January, 1866*.

1441. Where, prior to the decision of the U. S. Supreme Court in Tarble's case, a State court, having issued a writ of *habeas corpus* in a case of a military prisoner, attempted to enforce a process of contempt against the officer in charge, who, though duly making a return showing that the party was detained by the authority of the United States, refused to produce his body in court, — *held* that such attempt should be resisted by the officer, who should be supported in his resistance by such military force as might be necessary. III, 502, *August, 1863*; XIX, 305, *December, 1865*; XXI, 92, *December, 1865*. So, where a State court, after such a return, still assumed to proceed in the case and to order the discharge of the party, here a soldier in arrest as a deserter, — *held* that the execution of such order should be resisted and prevented by military force. III, 104, *June, 1863*; XXI, 157, *January, 1866*.

1442. Where, prior to the decision in Tarble's Case, an officer undergoing, in a State penitentiary, a sentence duly imposed by a court-martial, was discharged from his imprisonment by a State court and was at large, *advised* that he be forthwith rearrested and re-confined. XXX, 56, *December, 1869*. So, in a case of a soldier discharged from his enlistment, on the ground of minority, by a State court, *advised* that he be arrested by the military authorities and held to service. XXX, 190, *March, 1870*.

1443. But in a case of a soldier or other person held in military cus-

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writ may see that the prisoner is held by the officer in good faith under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority. \* \* \* The state judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.<sup>1</sup> This decision put an end to a controversy of many years standing, and swept away a mass of counter rulings by the State courts, the majority of which had sustained the authority of the State judiciary in such case.

<sup>1</sup> See citation from Tarble's Case in last note.



tody, in which a writ of *habeas corpus* is issued by the *United States* judiciary—a co-ordinate branch of the same sovereignty as that by which the party is restrained—it is the duty of the officer to whom the writ is addressed to make thereto a full return of the facts and to bring into court the body of such party, submitting to the court the whole question of authority and discharge, and abiding by its decision and order in the case.<sup>1</sup> XIX, 377, and XXI, 157, *January, 1866*.

#### HOLIDAY—PAY FOR.

1444. By the joint resolution of Congress, of January 6, 1885, it was provided that the "*per diem* employees" of the United States should be allowed certain days as holidays, naming January 1st, February 22d, July 4th and December 25th, together with "such days as may be designated by the President as days for national thanksgiving," and should receive the same pay for those days as for other days. *Held* that while such employees might be allowed by the Secretary of War to enjoy the Saturday half holiday established at New Orleans by a statute of Louisiana, they could not, if taking the holiday, legally be paid for such time. 62, 31, *October, 1893*. Where such employees have been present for duty either before or after a holiday, but not present both before and after, being absent a day or more either prior or subsequent thereto, they are entitled to be paid for such holiday, unless their employment was terminated the day before or began the day following it: in which cases they would not be employees of the United States at the time of the holiday. Card 5879, *February, 1899*.

1445. *Per diem* employees suspended and not at work during a period which includes a holiday are not entitled to pay for the holiday. Card 1668, *August, 1895*. Nor can employees who work on a holiday be given double pay for such service in the absence of a statute expressly authorizing the same. Card 4335, *June, 1898*.

1446. On January 19, 1893, the President proclaimed that on the day (January 20th) of the funeral of ex-President Hayes, all public business in the departments should be suspended. This not being one of the days included as public holidays by the joint resolution of January 6, 1885, *held* that the *per diem* employees at the Watervliet Arsenal were not entitled to be paid for that day. 57, 424, *February, 1893*.

#### HOSPITAL CORPS.

1447. The act of March 1, 1887, c. 311, "to organize the hospital corps of the army," &c., provides for "acting hospital stewards," as a

<sup>1</sup>See paragraphs 140, 969, 970, 971, Army Regulations of 1895, the last two paragraphs as amended by G. O. 127, A. G. O., 1900 (pars. 151, 1073-1075 of 1901).



separate grade in the corps, but does not prescribe any mode of filling that grade other than by declaring that "privates" of the corps may be detailed as such "acting" stewards. *Held*, therefore, that when such a private was so detailed, he ceased to be a private of the corps and became at once the acting hospital steward constituted by the act; and, if discharged while so detailed, should be discharged as an "acting hospital steward," receiving travel pay as such. 60, 157, *June, 1893*.

1448. *Held* that the provision of the Army Appropriation Act of Feb. 27, 1893, prohibiting the re-enlistment of certain "privates," applied to the "privates" of the hospital corps but did not apply to the "acting hospital stewards," who, under the act organizing this corps, of March 1, 1887, c. 311, constituted a distinct class and grade from the "privates." 58, 222, *March, 1893*.

1449. *Held* that a person enlisted in the hospital corps, or transferred to it from another part of the army under the authority of the act of March 1, 1887, c. 311, sec. 5, could not be transferred out of it or back again to the organization from which he was transferred originally, without a breach of contract. The authority to *transfer* to this corps is expressly granted by the statute, but there is no statutory authority for depriving transferred members, by undoing their transfers, of the positions given them according to the express law. 55, 96, *August, 1892*.

1450. *Held* that an enlisted man of the volunteer branch of the army may, under the act of March 1, 1887, creating the hospital corps, be transferred thereto as a private; and that the authority to make such transfers could legally be given to corps commanders.<sup>2</sup> Card 4122, *May, 1898*.

1451. General Orders 58, Adjutant General's Office, 1898, authorizes corps commanders to transfer enlisted men of the volunteer branch of the army to the hospital corps, but does not authorize such commanders to retransfer them to the volunteer organizations.<sup>3</sup> Card 6714, *July, 1899*.

1452. *Held* that neither the act organizing the hospital corps of March 1, 1887, nor par. 1578 A. R. (1889), relating to the assignment of privates of the corps as nurses, &c., was to be construed as restricting the use of nurses to attendance upon patients within the hospital, but that nurses might legally be furnished from such privates to attend officers at their quarters. 43, 115, *September, 1890*.

<sup>2</sup>This and preceding paragraph are quoted and concurred in by the Comptroller of the Treasury in an opinion, dated April 16, 1900, wherein he decided that acting hospital stewards are entitled to travel pay and extra pay (act of March 3, 1899) as such and not as privates, and if retired as acting hospital stewards are entitled to 75 per cent of the pay and allowances of that grade. 6 Comp. Dec., 807.

<sup>3</sup>See G. O. 58 and 82, A. G. O., 1898.

<sup>4</sup>See Circulars 45 and 50, A. G. O., 1898.

1453. Where a hospital is not supplied with enough privates of the hospital corps to do the necessary police duty, which, under sec. 5 of the act organizing the corps of March 1, 1887, they may properly be required to perform, *held* that *convalecents* at the hospital may, in the discretion of the surgeon in charge, and by his prescription and direction, be employed to assist in such duty. 44, 125, *December, 1890.*

## HOT SPRINGS HOSPITAL.

1454. Under the present regulations for the government of the Army and Navy General Hospital at Hot Springs, Arkansas, civil employees of the Government are not eligible to admission. 58, 452, *March, 1892.*

1455. Under the regulations for the government of the General Hospital at Hot Springs, published in G. O. 60 of 1892, "officers of the revenue marine" are made eligible to admission. *Held* that this description did not include medical officers of the "Marine Hospital Service," who are not officers of the "Revenue Marine" but belong to a distinct establishment. The former are appointed under the provisions of Title LIX, ch. 1, Rev. Sts., and of the act of January 4, 1889, c. 19, while the Revenue Marine is constituted under Title XXXIV, ch. 3, Rev. Sts. Both classes are under the direction of the Secretary of the Treasury, but their duties and functions are entirely different, and there is no ground for regarding the former as included in or attached to the latter.<sup>1</sup> 59, 162, *April, 1893.*

1456. The United States not being vested, by reservation or cession, with exclusive jurisdiction over the site of the General Hospital at Hot Springs, though owning the land, *held* that the courts and judicial officers of Arkansas had substantially the same jurisdiction and authority to issue and execute process to and upon the military and naval persons stationed or commorant at the hospital, as in cases of civilians there resident or commorant. 58, 284, *November, 1892.*

1457. *Held* that under the regulations for the government of the General Hospital at Hot Springs, Arkansas (G. O. 60, A. G. O., 1892, as amended by G. O. 40, A. G. O., 1893), discharged enlisted men of the Navy are not entitled during the three months within which they may reenlist under the act of February 8, 1889, to admission to the hospital. Card 2069, *February, 1896.*

<sup>1</sup> By an amendment of the Regulations of the Hospital, promulgated (since the above opinion) in G. O. 40 of 1893, officers of the Marine Hospital Service are now made eligible to admission.

## I.

## IMPRISONMENT OR CONFINEMENT.

**1458.** A sentence, which, in imposing confinement (or imprisonment the two terms being practically synonymous in sentences of courts martial), fails clearly to indicate how long the same is to continue, is irregular and inoperative. Such a sentence should be disapproved by the reviewing authority unless it can be procured to be corrected by a reassembling of the court for the purpose. XVI, 283, *June, 1865*.

**1459.** In imposing a sentence of confinement at a military prison, the court should properly add "at such place as the proper authority may designate," or words to that effect.<sup>1</sup> To direct that the place of confinement be designated by an officer inferior to the convening authority is irregular and improper. IV, 356, and V, 309, *November, 1863*; IX, 600, *September, 1864*.

**1460.** It is now established by a long series of precedents that a general court martial is authorized to adjudge, by sentence, a term of imprisonment to extend beyond the end of the pending term of enlistment of the soldier, or beyond his legal period of service. Thus, for example, where the term of the enlistment of the accused has still a year to run, the court—the gravity of the offence justifying it—may sentence him to an imprisonment for two years or longer: so, it may sentence him to be dishonorably discharged (thus itself discontinuing his period of service), and then confined for a designated term.<sup>2</sup> And such sentences may be *executed* with the same legality as any other sentence of imprisonment. In the former case the soldier will not be entitled to be released from the confinement at the end of his enlistment, nor, in the latter, will he, upon the execution of the discharge, become so entitled. In each case, upon the determination of the enlistment or service, the party continues to be held under his sentence not as a soldier but as a civilian U. S. convict.<sup>3</sup> XXXI, 89, *December, 1870*; 353, *May, 1871*; XXXVIII, 513, *March, 1877*; XXXIX, 509, *April, 1878*.

<sup>1</sup> A sentence of confinement is *executed* by sending the party under a proper guard to the place of confinement duly designated, and at the same time transmitting to the officer there in command a copy of the order approving the sentence and ordering the execution, together with other proper papers required to exhibit the status of the soldier. See paragraph 911, Army Regulations (1895), as amended by G. O. 112, A. G. O., 1899 (1012 of 1901).

<sup>2</sup> As to the *order* of the execution of the punishments, when dishonorable discharge and a term of imprisonment are imposed by the same sentence,—see § 1146, *ante*.

<sup>3</sup> See par. 152a, A. R. (169 of 1901).

Where the approval of a sentence of confinement in a case of a soldier, in which proceedings had been duly commenced pending his term of enlistment, was not promulgated till after such term had actually expired, but no discharge had been given to the soldier before promulgation, *held* that it would be legal to subject him to the confinement adjudged by the sentence. XIX, 600, *April, 1866*.

1461. Sentences of imprisonment till a fine, also imposed by the sentence, is paid, are sanctioned by the usage of the service. It is proper, however, in such sentences to affix a limit beyond which the punishment shall not be continued in any event. XIII, 472, *March, 1865*; XX, 16, *October, 1865*; XXXII, 47, *October, 1871*. Where a sentence adjudges a fine without also adding (with a view to enforcing its payment) a term of confinement,—such a confinement cannot of course legally be imposed by the military commander. XIII, 472, *supra*. So, *held* that par. II of G. O. 61, War Department, 1865, to the effect that, where a court martial, in imposing a fine, has failed to require that the prisoner shall be confined till the fine is paid, “he will not be released without orders from the War Department, except on payment of the fine,”—transcended the authority of an executive order; such a requirement being a *punishment*, which can be prescribed only by sentence of court-martial. XXXIII, 309, *August, 1872*.

1462. The old rule, that the term of a confinement (of so many months, years, &c.), imposed by sentence of court martial, commenced on the day on which the prisoner was delivered to the proper officer—as the officer in charge of the prison or commanding the post—to be confined according to the sentence (XI, 380, *January, 1865*), having been found inconvenient in practice, there was substituted for it by G. O. 21, Hdqrs. of the Army, of 1870, the rule that—“the confinement shall be considered as commencing at the date of the promulgation of the sentence in orders.” To hold that under this order the commencement of the confinement must be delayed until notice of it has reached the prisoner might lead to the same abuse which the order was intended to correct.<sup>1</sup> XXX, 150, *March, 1870*.

1463. While the fact that the accused has been confined for an unreasonable period awaiting trial may properly be taken into consideration by the court in estimating the period of confinement proper to be imposed upon his conviction (XXVIII, 104, *August, 1868*), neither the time during which the accused may have been held in arrest and confinement prior to trial, nor that during which he may have been so held after trial and before the promulgation of his sentence, can be *credited*

<sup>1</sup> See paragraphs 945 and 947 Army Regulations of 1895; 1046 and 1048 of 1901; also, paragraphs 13 and 15, p. 64, Court-Martial Manual (1901).



on a term of imprisonment adjudged thereby in executing the same. If the party has been detained for an unreasonably long period at either of these stages of the proceedings, he can be indemnified therefor only by a proportionate mitigation or remission of his punishment. XI, 380, *January, 1865*; XXVIII, 340, 482, *January and April, 1869*.

1464. Where an officer or soldier is sentenced merely to a term of confinement without the addition of "hard labor," other than in a penitentiary or the Leavenworth military prison, while he may properly be required to perform the ordinary domestic or police work directed by the sanitary regulations of the prison, he cannot properly be put to unusual labor of a severe and continuous character. Thus *held* that to require a soldier sentenced simply to be confined, and confined accordingly at Alcatraz Prison, to work daily at blasting and quarrying rock, was *adding to the punishment* (see SENTENCE AND PUNISHMENT), and therefore unauthorized. XXXVII, 640, *June, 1876*; XXXIX, 500, *March, 1878*; XLI, 123, *February, 1878*.

1465. To a proper execution of a sentence of confinement, a secure keeping of the person is of course essential. Where, therefore, it is not possible otherwise to prevent a prisoner's escape or to prevent violence on his part, he may be put in irons without adding to the punishment. But such exceptional restraint cannot legally be imposed except where thus *necessary*. XXXIV, 375, *July, 1873*.

1466. A prisoner not expressly required by his sentence to be confined in irons cannot legally be subjected to such form of confinement except where there is sufficient ground to apprehend serious violence on his part or an attempt to escape. A mere threat of violence would not ordinarily justify the use of shackles or fetters. 32, 35, *April, 1889*.

1467. It is not adding to the punishment in executing a sentence of confinement to require the prisoner to perform work prescribed for prisoners of his class by the *statute law*. Thus persons sentenced to imprisonment at the Military Prison at Leavenworth, though "hard labor" be not in terms added to the sentence, may legally be employed in the labor or at the trades indicated by Sec. 1351, Rev. Sts. XXXVII, 640, *June, 1876*; LI, 601, *March, 1877*; 42, 101, *July, 1890*.

1468. It is not adding to the punishment, and is authorized at military law, for the commander who ordered the original commitment, or his proper superior, to *change* the place of confinement of a prisoner, if such a change is required by the exigencies of the service, provided that no more severe species of confinement than that contemplated in the sentence is enforced after the transfer. XXI, 49, *November, 1865*; XXXIX, 659, *September, 1878*; XLI, 123, *February, 1878*.

1469. Where the sentence directs confinement at hard labor "in such place as the reviewing authority may direct," or words to that effect,



the reviewing authority may, the offence warranting it, designate a penitentiary; but if in such a case he designates a military post as the place of confinement, the place of confinement cannot, pending its execution at the post, legally be changed to a penitentiary. Card 1875, *November, 1895*.

1470. The Sundry Civil Act of March 2, 1895, provided for the transfer of the Military Prison at Fort Leavenworth, Kansas, from the Department of War to the Department of Justice, the prison to be thereafter known as the United States Penitentiary and "to be used for the confinement of persons convicted in the United States Courts \* \* \* or convicted by courts-martial of offences now punishable by confinement in a penitentiary and sentenced to imprisonment of more than one year." Where a soldier had been prior to this transfer duly convicted by court martial and sentenced to dishonorable discharge and penitentiary confinement, but the confinement was mitigated to imprisonment in the military prison at Fort Leavenworth (a well established form of mitigation in the military practice), — *held* that, after the transfer of the prison to the Department of Justice, to hold the prisoner therein would be in fact transferring him from a military prison to a penitentiary, thereby adding to his punishment without authority of law. Card 187, *June, 1895*. See Card 7450, *December, 1899*.

1471. Persons convicted by courts-martial and sent to the United States Penitentiary under the provisions of the Sundry Civil Act of March 2, 1895, cannot be turned over to a United States marshal for transportation to the penitentiary, but must be delivered there by the military authorities. Card 1201, *July, 1895*.

1472. Prison authorities have no right to open and inspect letters addressed to or sent by their prisoners without the consent of the latter. They can however retain such letters unopened which may come into their possession until such time as the parties may be tried or released, or the letters otherwise disposed of under judicial process.<sup>1</sup> Card 2469, *July, 1896*.

1473. While the authority upon whom it devolves to execute a sentence of confinement is not authorized to add to the punishment adjudged, he is, on the other hand, not justified in executing the same in so indulgent a manner as to divest the punishment of its intended and legitimate force and effect. Thus where certain prisoners, sentenced to terms of confinement on conviction of grave offences, were, while in ordinary good health, permitted to be employed upon honorable duties as clerks, &c., in the offices attached to (and one of which was outside of) the prison, *held* that such employment was in derogation

<sup>1</sup> See Circ. 8, A. G. O., 1896; also U. S. Postal Guide, May, 1896, p. 13.

tion of the proper requirements of a sentence of imprisonment and should be ordered to be discontinued. XI, 544, *March, 1865*.

1474. Where a soldier, while undergoing a sentence of confinement, was, by mistake, released by the post commander before the expiration of his legal term, *held* that the department commander by whom the sentence had been approved was legally authorized to order the soldier to be re-committed for the purpose of completing his punishment. XXVII, 429, *December, 1868*.

1475. Where a soldier, after the imposition by the court in his case of a sentence of confinement but before action had been taken upon the same by the reviewing authority, escaped from custody, and, after the sentence had been duly approved and promulgated, was arrested, *held* that he would legally and properly be committed to the confinement adjudged. XXIX, 7, *June, 1869*. So a soldier who escapes from custody pending the execution of a sentence of confinement, and subsequently is arrested or surrenders himself, may legally be remanded to serve out his term as in a case of a civil prisoner. XXXVIII, 119, *July, 1876*.

1476. Where a soldier, pending the execution of a sentence of confinement (at a military prison or in the guard house of a post), becomes ill and is removed to the hospital for treatment, *held* that the time spent in hospital is not to be required to be made good by additional confinement at the end of the term of confinement imposed by the sentence. A term of confinement is continuous except when interrupted by escape. In a case of escape, the prisoner will, upon recapture, properly be held to serve out the unexpired part of the sentence; but to require that a prisoner should make good time spent in hospital would be in fact adding to the punishment and illegal. No "usage" can justify such action. 46, 176, *March, 1891*; 51, 146, *December, 1891*; 59, 173, *April, 1893*.

1477. The discharge, by executive authority under the 4th Article of War, of a soldier whose enlistment has not expired but who is undergoing a term of imprisonment imposed upon him by a sentence of court martial (which did not also include the penalty of dishonorable discharge, or imposed it to take effect at the end of the imprisonment), *held* to operate not merely as a discharge of the soldier from his enlistment but as a remission of the unexecuted term of his confinement and to entitle him to be set at liberty.<sup>1</sup> XXXI, 556, *August, 1871*; XLI, 350, *July, 1878*.

<sup>1</sup>This opinion was adopted and published in Circular letter from the War Department to department commanders, Aug. 12, 1871. And note an instance of its application—to the cases of twenty three prisoners—in G. C. M. O. 118, Dept. of the Missouri, 1871.

1478. So where a soldier, while under a sentence of confinement for a term less than the remaining term of his enlistment (imposed without dishonorable discharge), was for a further offence tried, convicted, and sentenced to dishonorable discharge and imprisonment, and was thereupon duly discharged accordingly, *held* that the period of the pending confinement under the first sentence was thereupon terminated, leaving to be executed, after the discharge, only the confinement adjudged by the second sentence.<sup>1</sup> XLI, 576, *June, 1879*; 61, 424, *September, 1893*; Cards 2376, 2762, *October and November, 1896*.

1479. Where a soldier while undergoing a sentence of confinement is brought to trial for a further offence, and, on conviction, is sentenced to a further term of imprisonment, the punishment thus adjudged is *cumulative* upon that pending, and its execution will properly commence at the date when the pending confinement terminates, whether by expiration of time or by remission. To render a punishment thus cumulative, it is not required that it should be designated as such by the court in the sentence. XXXI, 315, *April, 1871*; XXXII, 670, *June, 1872*; XXXIV, 479, *September, 1873*; XXXV, 433, *June, 1874*; XXXVIII, 43, *April, 1876*; 556, *April, 1877*; XLIII, 102, *December, 1879*.

1480. Where a deserter under sentence of dishonorable discharge and confinement escaped, pending the confinement again enlisted, deserted from his second enlistment, and, upon arrest, was again sentenced to dishonorable discharge and confinement, *held* that he was legally liable to be subjected to both terms of confinement, the second as a cumulative punishment upon the first. 38, 124, *January, 1890*.

1481. Where a soldier at two successive trials for separate offences was sentenced, upon the first trial to dishonorable discharge and imprisonment, and upon the second to further imprisonment, and the two sentences were approved and promulgated in orders bearing the same date; *held* that, as the law does not recognize fractions of a day, these sentences were to be regarded as having gone into operation at the same moment and taken effect as one sentence, so that the execution of the dishonorable discharge imposed by the former sentence did not affect the enforcement of the punishment of confinement imposed by the latter sentence, but that the same was legally enforceable as cumulative or rather continuing upon the term of confinement imposed by the former sentence. XXXIV, 479, *September, 1873*.

1482. *Held* that the act of June 14, 1870 (16 Stats., 128), providing for a deduction on account of good conduct, to be allowed at

<sup>1</sup>See paragraph 2, Circular 10, A. G. O., 1896.

the end of the confinement, as a deduction from and abridgement of the term of sentence of prisoners convicted of offences "against the laws of the United States," and confined under sentence in any State jail or penitentiary, applied to prisoners confined in such prison under sentence of courts martial.<sup>1</sup> XXXIV, 22, *October, 1872*.

1483. Where, pending the confinement, under sentence of a soldier in a military prison, a portion of his term of confinement was by competent authority remitted, *held* that he remained entitled, upon good conduct, to the abatement provided in general terms by G. O. 64 of 1875; the fact of the remission not affecting his right to the abatement during the continuance of his term as reduced by the remission. XXXVII, 490, *April, 1876*.

1484. A remission of part of a sentence of confinement has the effect of leaving the reduced sentence as though it were the original; and the prisoner will be entitled to the time allowance for good conduct precisely as if the original term had not been reduced. 44, 66, *November, 1890*.

1485. The duty of a post commander with regard to the holding and restraint of a prisoner sentenced to be confined at the post is not affected by the fact that the prisoner was adjudged by the same sentence to be dishonorably discharged and has been discharged accordingly. The amenability to prison discipline continues during the term of the confinement; although, except at the Leavenworth Military Prison (see Sec. 1361, Rev. Sts.), the prisoner cannot legally be brought<sup>2</sup> to trial by court martial for misconduct during such term. LVI, 351, *July, 1888*.

1486. The object of sec. 5 of the Summary Court Act of June 18, 1898, was to make dishonorably discharged military prisoners triable by court martial for offences committed during their confinement. It was not intended to make any other change in the law, and should not be so construed. Card 5589, *December, 1898*. It does not confer upon courts martial jurisdiction as to offences committed prior to the dishonorable discharge. Cards 7762, 8051, *March and April, 1900*; 9406, *December, 1900*.

<sup>1</sup>See the subsequent act of March 3, 1875 (1 Sup. Rev. Sts., 89), and G. O. 64, War Department, 1875, referring to this statute (in connection with Sec. 1352, Rev. Sts.), providing for the partial remission for good conduct of the sentences of prisoners confined in the Leavenworth Military Prison and applying to cases of prisoners in *salutary* prisons a rule similar to that established by such statute, as follows:—"To equalize the practice in regard to punishment of military prisoners so far as practicable, an abatement of five days for each month of consecutive good conduct may be allowed upon each sentence to confinement for over six months." But see par. 915, Army Regulations of 1895 (1016 of 1901), as to abatement now authorized.

<sup>2</sup>But see now sec. 5 of the act establishing the summary court, approved June 18, 1898. (Court-Martial Manual 1901), p. 120.



## IMPROVEMENT OF RIVERS AND HARBORS.

1487. When Congress, in the exercise of its exclusive power to direct how the public money shall be employed, has appropriated a certain sum, to be devoted, without exceptions or provisos, to a certain specific internal improvement, it devolves upon the Executive Department of the Government, charged as it is with the execution of the laws enacted by the Legislative, to proceed with the work under the appropriation, without entertaining any question as to the expediency of the expenditure. Thus where Congress had made in general terms an appropriation of a specific amount for improving a certain river, *advised* that it was for the officer charged with the improvement simply to do the work, without delaying to raise or consider questions or claims of title to the land, &c., to be affected by the improvement; such matters being quite beyond the province of an executive official under the circumstances. XLIII, 101, *November, 1879*.

1488. Where derelict articles—wrecks for example—are encountered by officers of the Engineer Corps, as obstructions to the improvement of rivers, harbors, &c., required by Congress (in the exercise of its power to regulate commerce) to be cleared and improved, it will be legal and proper for such officers to remove such obstructions in the most effectual manner. If the property is not actually abandoned and is valuable, it will in general be expedient first to give notice to the owners (personally if practicable, or, if not, through the newspapers) themselves to make the removal within a certain reasonable time.<sup>1</sup> XXXVI, 569, *July, 1875*.

1489. Where a contract was about to be made with a civilian for the removal, from a harbor channel, of certain wrecks, not known to be fully abandoned (and directed by act of Congress to be caused to be removed by the Secretary of War), and it was proposed by the engineer officer in charge to stipulate in the contract that the wrecks when removed should belong to the contractor, *held* that this could not properly be done, the United States having no property in such wrecks (the same not being government vessels), but simply a right to remove them as constituting obstructions to commerce between the States. XLIII, 284, *April, 1880*.

<sup>1</sup> See sec. 4 of act of June 14, 1880 (1 Sup. R. S., 296), which provides for the removal of sunken wrecks and prescribes the giving of such notice. Also, later acts of Aug. 2, 1882 (*id.* 369); Sept. 19, 1890 (*id.* 802); and sec. 15 of act of March 3, 1899 (30 Stat., 1152).

In an opinion of the Attorney General of May 24, 1877 (15 Opins., 284), it is held that the Secretary of War, where authorized by an appropriation act to improve the navigation of a navigable stream, may cause to be removed wrecks not yet abandoned but still private property, if he considers them obstructions to navigation. And see his later opinion of April 27, 1880 (16 Opins., 479), as to the authority of the United States to improve navigable rivers to the disregard of individual rights of property in the soil of the bed.



1490. All islands in the Missouri river and in the State of Missouri, which were formed and in existence prior to the admission of the State into the Union, belonged either to the United States or to the parties to whom the United States or Spain had granted them. Upon the admission of the State into the Union the National Government relinquished to the State ownership of the bed of the river<sup>1</sup> therein, and since admission of the State islands formed on the bed have belonged to the State,<sup>2</sup> or may belong for school purposes to the counties in which they are situated under an act of the Missouri legislature approved April 8, 1895. The matter of purchasing for river improvement purposes for the United States willow brush and other material, products of these islands, would thus depend upon the question of title to the islands and control thereof at the time the purchases are made. Card 3186, *May, 1897*.

1491. Section 3736, Rev. Sts., provides that "no land shall be purchased on account of the United States, except under a law authorizing such purchase." By the act of April 24, 1888 (25 Sts. 94), the Secretary of War was authorized to "cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law." Further provision as to the method of condemning lands for public use was made by the act of August 1, 1888 (25 Stats. 357). The act of April 24, 1888, *supra*, provided "that when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay; and provided further that the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works." The authority to condemn, purchase, or "accept donations" applies only to works "for which provision has been made by law." *Held*, therefore, that in the absence of an appropriation for the works or express authority from Congress, the Secretary of War is precluded by Sec. 3736, Rev. Sts., from acquiring lands for river and harbor improvements; the word "purchase" in this statute having been construed in its legal sense as including every mode of acquiring land other than by descent.<sup>3</sup> Card 3896, *February, 1898*.

<sup>1</sup> See Pollard v. Hagan, 3 Howard 212; Goodtitle v. Kibbe, 9 *id.* 471; Doe v. Beebe, 13 *id.* 25; Withers v. Buckley, 20 *id.* 84.

<sup>2</sup> Cooley v. Golden, 23 S. W. Reporter, 100.

<sup>3</sup> See 7 Opin. At. Gen. 114, 121; *Ex parte Hebard*, 4 Dillon, 384. A conveyance of lands to the United States is, under this statute, void and inoperative unless the purchase is authorized by Congress. N. S. v. Tichenor, 12 Fed. Rep. 415; 6 Comp. Dec. 791.

1492. The owner of lands flooded by dams constructed in improving navigation is entitled to compensation for damages sustained by such flooding.<sup>1</sup> *Held*, that the Secretary of War has authority under the act of April 24, 1888 (1 Sup. Rev. Sts., 2d edition p. 584), to purchase lands flooded by dams constructed in river and harbor improvements, or the right to flood the same, and where springs are located on such lands, this fact may properly be considered in determining the amount to be paid. Card 1074, *March, 1895*.

1493. The River and Harbor Act of Aug. 17, 1894, sec. 4, makes it the duty of the Secretary of War to prescribe rules and regulations for the use and navigation of all "canals and similar works of navigation," owned, operated or maintained by the United States, etc., and also makes the violation of any of these regulations a misdemeanor punishable in the proper United States court. *Held*, that this section does not apply in general to natural waterways, though their navigability has been improved and is being maintained by the Government. Cards 424, *October, 1894*; 1047, *March, 1895*; 2919, *February, 1897*; 3449, *August, 1897*.

1494. Sect. 13 of the River and Harbor Act of Aug. 17, 1894, provides "that after the regular or formal report on any examination, survey, project, or work under way or proposed is submitted, no supplemental or additional report or estimate for the same fiscal year shall be made unless ordered by a resolution of Congress." To construe this language strictly would lead to two conclusions which it is improbable Congress intended, to wit: 1. Additional estimates for work which has become necessary in order to preserve that already done or being done during the fiscal year, cannot be made. 2. The Senate and House of Representatives, acting separately, cannot call for information on this subject. *Held*, therefore, that the section should be liberally construed as follows: That it prohibits additional estimates (unless ordered by resolution of Congress), *extending* the work already estimated for; and that the "resolution of Congress" referred to includes separate resolutions of either house. Card 2148, *March, 1896*.

1495. Work done by the United States upon rivers and harbors is civil work. The fact that military officers are assigned to duty on it does not make it a branch of the military service. The work itself does not relate to military matters or in any way affect the military establishment of the Government. It is paid for, not out of any appropriation for the military establishment but out of a separate civil appropriation for the improvement of rivers and harbors. *Held* therefore, that par. 808, Army Regulations of 1889, was not applicable to civilians employed in the improvements of rivers and harbors, said

<sup>1</sup>Gould on Waters, 2d edition, § 243, and authorities cited; Hackmatack v. Koshkem Imp. Co., 66 Wis. 439; Am. & Eng. Ency. of Law (1st edition), vol. 16, p. 265, note 1.

civilians not being "in the employ of any branch of the military service." Card 147, *August, 1894*. It was the intention however to have paragraph 569, A. R. of 1895 (see 648 of 1901), apply to river and harbor work; but whether it applies or not the Secretary of War has discretionary power to require with reference thereto the reports mentioned in the regulations. Card 3418, *August, 1897*.

**1496.** Section 1241, Revised Statutes, prescribes that the President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged or unsuitable for the public service. *Held* that the term "military stores" does not include public property purchased in carrying out the civil works of river and harbor improvements. The regulations, however, with reference to property accountability, as contained in the Army Regulations of 1895, were intended to cover all public property under the control of the Secretary of War, whether military stores or not. The regulations (and orders) relating to the inspection of unserviceable property with a view to its condemnation apply, therefore, to public property used in river and harbor improvements. There is however, no existing law which would prevent such modification of these regulations as would authorize the proper engineer officer to drop property, other than military stores, from his returns on his own certificate that its condition resulted from wear and tear in the service, that it was worthless and had been destroyed in his presence. Card 3419, *August, 1897*.

**1497.** A contractor engaged upon river and harbor work for the Government may obstruct navigation to the extent necessary to do his work, if such obstruction cannot reasonably be avoided. He is however liable both civilly and criminally for an unauthorized obstruction, and the Secretary of War is without authority to relieve him from such liability. Card 3839, *February, 1898*.

#### INDIAN COUNTRY.

**1498.** *Held* that the term "Indian country," as employed in the statutes regulating trade and intercourse with the Indians (see, particularly, Ch. IV, Title XXVIII, Rev. Sts.), might properly be defined in general as including the following territory, viz: Indian reservations occupied by Indian tribes; other districts so occupied to which the Indian title has not been extinguished; any districts not in other respects Indian country, over which the operation of those statutes may be extended by treaty or act of Congress.<sup>1</sup> XXXIX, 214, *October, 1877*.

<sup>1</sup>See this opinion as adopted and incorporated in G. O. 97, Hqrs. of Army, 1877; also, in the same connection, 14 Opns. At Gen. 289, United States v. Forty-three Gallons of Whiskey, 3 Otto, 188; Bates v. Clark, 5 Cl., 204, United States v. Seveloff, 2 Sawyer, 311. See par. 475, Army Regulations of 1895 (551 of 1901).

**1499.** The Secretary of War has no general authority to license trade with Indians in the Indian country. By Sec. 2129, Rev. Sts., such licenses can be given only by a "superintendent of Indian affairs, or Indian agent or sub-agent." **55**, 283, *September 1892*.

**1500.** The Secretary of War has no general authority to license the introduction of spirituous liquors into the Indian country. Under Sec. 2130, Rev. Sts., and the act of July 23, 1892, c. 234, amending that section and extending it to beer and other malt liquors,<sup>1</sup> the Secretary of War is without authority to permit the introduction into that country of any spirituous or malt liquors intended for sale. **55**, 172, 380, *August and September, 1892*; **56**, 31, *October, 1892*; Card 506, *October, 1894*. The statutes cited do not authorize the Secretary of War to license the sale of spirituous or malt liquors in the Indian country. Whether a particular article is in fact spirituous or malt liquor is a question for the courts, and not the War Department, to decide. Cards 1747, *November, 1895*; 7813, 7981, *March and April, 1900*.

**1501.** Prior to the act of July 23, 1892, no formal rule or regulation governing the subject of the introduction of liquor into the Indian country was promulgated by the War Department, but shortly after the passage of the act the Secretary of War decided that no permits would be granted except in cases where the liquor was to be used in or connected with the United States Army. This decision was adhered to until October, 1897, when it was modified by a further decision that permits to introduce wine into the Indian country for sacramental purposes would be granted upon the application of any clergyman having charge of any congregation or district in said country when forwarded to the War Department through the applicant's ecclesiastical superior, or upon other evidence of authenticity. The authority of the War Department to issue permits under the statutes covering the matter has in practice been viewed as limited to permits to introduce intoxicating liquor into the Indian country and as not extending even by implication to permits for its sale. Thus repeatedly held that permits to individuals to introduce into the Indian country any kind of intoxicating liquor, intended for sale either as a beverage or for medicinal purposes, cannot legally be granted. Cards 2399, 2406, 2571, 2795, *July to December, 1896*; 3140, 3404, 3716, *April to December, 1897*; 4002, 4105, *May, 1898*; 6857, 6900, *August and September, 1899*; 4105, *June, 1900*.

**1502.** In view of the terms of the act of May 21, 1884, establishing a civil government for Alaska, *held* that the military authorities could no longer legally issue permits for the introduction of liquors into

<sup>1</sup> See now this section as amended by act of January 30, 1897 (29 Stats. 506)



Alaska under G. O. 57 of 1874; sec. 14 of said act being deemed impliedly to repeal, as to Alaska, that portion of Sec. 2139, Rev. Sts., which empowered the Secretary of War to authorize such introduction.<sup>1</sup> L, 529, *July, 1886*.

1503. In view of the positive terms of Sec. 2140, Rev. Sts., an officer of the army not only *may* but *should* "take and destroy any ardent spirits or wine found in the Indian country except such as may be introduced therein by the War Department." The Section imposes this as a "duty" upon "any person in the service of the United States"—including of course military as well as civil officials. *Held* however that the authority given by the statute to destroy liquor brought into an Indian reservation did not authorize the destruction by the military of a building, the private property of a citizen, in which the liquor was found stored. XXXV, 350, *April, 1874*.

1504. In view of the duty devolved by Sec. 2140, Rev. Sts., upon "any person in the service of the United States," to take and destroy spirituous liquors in the Indian country, *held* that a post commander in such country who seized and destroyed a quantity of such liquors introduced into such country without the authority of the Secretary of War, but not found within the limits of his military command, had not exceeded his powers. XXXI, 205, *February, 1871*.

1505. Under Sec. 2147, Rev. Sts., authorizing the use of the military in the removal from the Indian country of "persons found therein contrary to law," *held* that the President was authorized to direct that a company of U. S. troops be stationed in the Indian Territory near the Kansas line to act as a patrol, and to apprehend and return within that line any and all lawless persons, guilty of crimes committed in Kansas, who have escaped from justice into the Indian country. 59, 480, *May, 1893*.

1506. Under Sec. 2150, Rev. Sts., a military commander may be authorized and directed by the President to arrest by military force and deliver to the proper civil authorities for trial, any white persons or Indians who may be in the Indian country engaged in furnishing liquor to Indians in violation of law; as also to prevent, by military force, the entry into such country of persons designing to introduce liquor therein contrary to law. *Held* that this authority to *prevent* was clearly an authority to *arrest*, where arrests were found necessary to restrain persons attempting to introduce liquor or other inhibited property. XLII, 192, *March, 1879*.

1507. *Held* that, under Sec. 2152, Rev. Sts., the military forces may, by the authority of the President, be employed to assist in making the

<sup>1</sup>See U. S. v. Nelson, 20 Fed. Rep., 202.



arrest of Indians concerned in the killing of cattle and committing of depredations on the frontier, provided their offences were committed in the Indian country or by Indians under the legal charge of an Indian agent. 65, 15, *May, 1894*.

#### INDIAN SOLDIER OR SCOUT.

1508. Where an enlisted Indian soldier belongs to a tribe which remains "under the charge of any Indian superintendent or agent," it is an offence under Sec. 2139, Rev. Sts., to sell to him spirituous liquor. Otherwise if he be attached to no such tribe and is under no such "charge." 61, 333, *September, 1893*.

1509. *Held* that there was no statute of the United States under which the selling of spirituous liquor to Indian soldiers (not under the charge of an Indian agent), stationed on a U. S. military reservation, by a civilian making the sales off the reservation, could be punished as an offence. 53, 407, *May, 1892*.

1510. In the absence of legislation authorizing the appointment of farriers or blacksmiths in or for the Indian scouts of the army, *held* that to muster a scout as blacksmith for Indian scouts, with pay at the rate fixed by law for blacksmiths of cavalry, would be unauthorized and the pay could not legally be rendered.<sup>1</sup> 40, 446, *May, 1890*.

1511. *Held* that San Carlos Indians who were members of their tribe at the time of the passage of the act of Congress approved February 18, 1895 (28 Stats. 665), granting to a railroad company a right of way across its reservation, were not, by reason of their employment as scouts in the service of the United States, deprived of their share of the compensation paid by the railroad company to the tribe for the privilege of crossing the reservation. Card 4040, *July, 1898*.

#### INDIAN WAR.

1512. Active hostilities with Indians do not constitute a state of foreign war, the Indian tribes, even where distinct political communities, being subject to the sovereignty of the United States.<sup>2</sup> Warfare inaugurated by Indians is thus a species of domestic rebellion, but it is so far assimilated to foreign war that during its pendency and on its theatre the laws and usages which govern and apply to persons during the existence of a foreign war are to be recognized as in general prevailing and operative. See § 164, *ante*, and note to § 1684, *post*. That the mere making of predatory incursions by parties of Indians with

<sup>1</sup> U. S. v. Hurdman, 53 Fed. Rep., 543.

<sup>2</sup> See A. R. 484 (561 of 1901).

<sup>3</sup> See Worcester v. Georgia, 6 Peters, 515.

whose tribe no general hostilities have been inaugurated does not constitute an Indian war, see § 1686 and notes.

1513. *Held* that the Cherokee Nation, during the civil war, did not occupy the status of an insurrectionary State, and was not therefore included in the application of the statutes and proclamations which related to such States, but that its attitude from the date of its treaty with the Confederate government of October 7, 1861, to its treaty with the United States of July 19, 1866, was that of an *ally* of the Confederacy, to the extent that the individual members of the nation who took part in hostilities against the United States became legally assimilated with the enemy. XXX, 20, *July, 1869*.

1514. Indians who, having occupied an attitude of hostility or *quasi* hostility toward the United States, have in good faith resumed and been admitted to friendly relations therewith, are entitled, as repentant wards, to the protection of the Government, and acts of violence committed against them as if they were enemies, are not acts of legitimate warfare but crimes. Thus where an officer in command of a regiment of volunteer cavalry made a sudden and violent attack upon a village of friendly Indians (who, having been in a state of partial hostility had returned to their allegiance and had in fact been recognized as entitled to protection by the military authorities), and caused the massacre of several hundred persons of whom the larger portion were women and children,<sup>1</sup>—*held* that his act was wholly unauthorized and criminal; and in view of the fact that by reason of the expiration of the term of his regiment he had been mustered out of the service before he could be brought to trial by court martial,—*advised* that, as a vindication of the good name of the army and the reputation of the Government, which this atrocious act had compromised, there be issued from the War Department a general order setting forth briefly the circumstances of the crime and so denouncing it as to discharge, as far as possible, the military administration from responsibility therefor. XVII, 424, *October, 1865*.

#### INSANITY.

1515. Where indications of insanity are developed by the accused in the course of a trial by court martial, the court will properly suspend proceedings and report the facts to the convening authority, adjourning meanwhile to await his orders.<sup>2</sup> XXXIII, 661, *January, 1873*.

<sup>1</sup>See this raid upon Cheyenne Indians in Colorado known as the "Sandy Creek Massacre," described and denounced in the Report of the Congressional "Committee on the Conduct of the War," of May 4, 1865.

<sup>2</sup>See a case of this nature, where this course was pursued, in G. C. M. O. 39, Dept. of the Missouri, 1868. As to the similar practice of the civil courts, see *People v. Ah Ying*, 42 Cal. 18, also *Taffe v. State*, 23 Ark. 34.

**1516.** If an insane soldier be brought to trial by court martial and he is shown by the record to have been insane pending the trial, the proceedings and sentence, if any, should be declared null and inoperative in orders. If the question of insanity in his case is not raised till after the proceedings have been acted upon and the sentence has been approved, and it then appears that he was actually insane, the sentence should be remitted. LV, 563, *April, 1888*.

**1517.** The Government has no power to compel an officer of the army to furnish his wife, for her support, with a certain proportion, or any part, of his pay. Where such an officer is confined in an insane asylum, his wife may, by having a curator appointed, be enabled to avail herself of his pay for the support of herself and her family. 59, 348, *May, 1893*. The wife of an officer under treatment at the Government Insane Hospital, who has been duly appointed, and has given bond as, the guardian of her husband, under the laws of the State of her residence, may, by the authority of Sec. 952, Rev. Sts., D. C., collect and receive his pay or other moneys that may be due him, in the same manner as if her "authority had been derived from the tribunals of the District." 57, 479, *February, 1893*.

#### INTERPRETER.

**1518.** That a member of the court acted as interpreter on a trial, *held* an irregularity, but one which did not affect the legal validity of the proceedings. IX, 15, *May, 1864*.

**1519.** Where the charges against a private soldier were preferred by the captain of his company, who also acted not only as a prosecuting witness but as interpreter on the trial, *held* a grave irregularity which might well induce a disapproval of the proceedings and sentence, unless it quite clearly appeared that no injustice had been done the accused.<sup>1</sup> VII, 562, *April, 1864*.

### J.

#### JUDGE-ADVOCATE.

**1520.** In view of the comprehensive terms of the 74th of the new code of Articles of War, *held* that officers empowered by Arts. 81 and 82 to order regimental or garrison courts martial were as fully authorized to detail judge-advocates for the courts convened by them as were

<sup>1</sup>That an important witness for the prosecution on a trial should not properly be permitted to interpret the testimony of another such witness, is remarked in G. C. M. O. 24, Dept. of Texas, 1875.

the officers who were empowered by Arts. 72 and 73 to order general courts.<sup>1</sup> XLIII, 100, *December, 1879*; 221, *February, 1880*; 54, 348, *July, 1892*.

1521. Any commissioned officer may legally be appointed judge-advocate of a court martial. Thus a surgeon, assistant surgeon, or a chaplain, is legally eligible to be so detailed. IX, 377, *July, 1864*.

1522. A separate judge-advocate should be appointed for each general court martial convened by a department, or other competent commander. The same officer may indeed be selected to perform the duties of judge-advocate as often as may be deemed desirable by the commander, but he should be detailed anew for every court martial on which he acts. To appoint in a general order a particular officer to act as judge-advocate for all the courts to be held in the same command would be quite irregular and without the sanction of precedent. II, 54, *March, 1863*; XVI, 429, *August, 1865*.

1523. It is competent for the commander who has convened a court martial to relieve the judge-advocate originally detailed for it and substitute another in his place; and the second may in the same manner be relieved by a third, &c. The relieving, however, of a judge-advocate pending a trial must in general embarrass the prosecution of a case, and should not be resorted to if it can well be avoided. V, 550, *December, 1863*; VII, 534, *April, 1864*.

1524. Where there have been two or more judge advocates successively detailed in the course of a trial, the one who is acting at the close is the one (and the only one) required to authenticate the proceedings by his signature. II, 148, *April, 1863*.

1525. While a judge-advocate may be relieved pending a trial and a new one appointed, it would not be proper to make such a change after the conclusion of a trial, simply for the purpose of having the record authenticated. If authentication by the judge-advocate who officiated at the close of the trial cannot be obtained the sentence should be disapproved.<sup>2</sup> Card 5230, *October, 1898*.

<sup>1</sup>This view has been adopted and acted upon in G. O. 15, Hdqrs. of Army, Feb. 27, 1880, as follows:

"Under the provisions of the 74th Article of War, officers who may appoint a court martial shall be competent to appoint a judge-advocate for the same. Accordingly, a judge-advocate is hereafter to be appointed for a regimental or a garrison court martial in like manner as for a general court.

"General Orders No. 49, of 1871, prescribing a form of oath for the recorders of regimental and garrison courts, is rescinded."

In an official communication, of May 13th, 1880, addressed to the Comdg. Gen. of the Mil. Div. of the Atlantic, this order is declared by the Secretary of War to be intended to be mandatory, not directory merely.

<sup>2</sup>But A. R. 254, as amended by G. O. 134, A. G. O., 1900 (1055 of 1901), now provides, *inter alia*, that "Whenever, by reason of the death or disability of the judge-advocate occurring after the court has decided on the sentence, the record can not be authenticated by his signature it must show that it has been formally approved by the court and must be authenticated by the signature of the president."



1526. A direction in an order convening a general court martial that if the judge-advocate be prevented from attending the junior member of the court will act in his stead, *held* irregular and improper; the function of a judge advocate as prosecuting officer (see Art. 90) not being properly compatible with that of a member of a court martial. And the member having acted as judge-advocate and member in the case, *advised* that the proceedings be disapproved by the reviewing authority. II, 60, *March, 1863*; XXI, 300, *March, 1866*. A court martial has of course no authority to direct or empower its junior member or any other officer to act as its judge-advocate. XXVIII, 198, *October, 1868*.

1527. An officer serving as judge-advocate on the *staff* of a department or army commander has as such no authority to act as judge-advocate of a court martial convened by such commander. If it is desired that he should act as judge-advocate of such a court, he should be specially detailed for the purpose. V, 140, *October, 1863*.

1528. While a civilian may legally be appointed, or rather employed, as judge-advocate of a court martial, such an employment has, for the past fifty years, been of the rarest occurrence in the military service.<sup>1</sup> Civil judge-advocates have been much more frequently employed for naval than for military courts martial.<sup>2</sup> XX, 507, *March, 1866*.

1529. While a judge-advocate is not subject to challenge (XXXV, 618, *October, 1874*), and it cannot affect the legal validity of the proceedings of a court martial that the judge-advocate was personally objectionable or hostile to the accused (XXVII, 127, *August, 1868*; XLIII, 106, *December, 1879*), it is yet desirable to detail as judge advocate, if practicable, an officer who has no considerable prejudice against the party to be tried, or any decided personal interest in his case. Thus the selection as judge-advocate of an officer who was not only a material witness for the prosecution but would be promoted in case the accused, an officer of his regiment of a higher grade, were dismissed by the court, *remarked upon* as an unfortunate one.<sup>3</sup> XXI, 177, *January, 1866*; XXXI, 361, *May, 1871*.

1530. An officer cannot in general fitly or becomingly act as judge-

<sup>1</sup> The last occasions of such employment are believed to have been those of the trial of the persons charged with complicity in the assassination of President Lincoln, and the trial of Major Haddock, Prov. Mar. Dept. (see G. C. M. O. 356 and 565, War Dept., 1865), upon which Hon. J. A. Bingham and Hon. Roscoe Conkling were respectively employed as judge advocates. For an early case in which a civilian, who was afterwards a President of the United States, was employed as judge advocate, see note to § 1663, *post*.

<sup>2</sup> In view of the provisions of sec. 17 of the act of June 22, 1870 (Sec. 189, Rev. Stat., transferring to the Department of Justice the authority to employ counsel for the executive departments, neither the Secretary of War nor the Secretary of the Navy is now authorized to retain a civilian lawyer to act as judge-advocate of a court martial. 13 Opus. At. Gen. 514; 14 *id.* 13.

<sup>3</sup> See G. C. M. O. 5, War Dept., 1871; do. 41, *id.*, 1875.

advocate in a case in which he is personally interested as accuser or prosecutor. 39, 35, *February, 1860*. Where the judge-advocate had prepared the charges and was the accuser in the case, and moreover entertained a strong personal prejudice or hostility against the accused, *held* that he was ill-chosen to act as judge advocate especially in the capacities of prosecuting official and adviser to the court. XLIX, 613, *December, 1885*. One who, without personal prejudice against the accused or interest in his conviction, has signed the charges as company commander, may not improperly act as judge-advocate in the case. 63, 240, *January, 1894*.

1531. A judge-advocate is not authorized to entertain charges in the first instance: he can properly act upon charges, *i. e.* make service of the same, prepare the case for trial, &c., only when the charges are transmitted to him for the purpose by the officer who has convened the court or detailed him as judge-advocate. XLII, 202, *March, 1879*.

1532. The judge-advocate is not unfrequently directed to prepare or re-frame charges: but where charges, already formally preferred, are transmitted to him for prosecution, he should not assume to modify them in material particulars in the absence of authority from the convening officer. While he may ordinarily correct obvious mistakes of form or patent or slight errors in names, dates, amounts, &c., he cannot without such authority make *substantial* amendments in the allegations, or—least of all—reject or withdraw a charge or specification, or enter a *nolle prosequi* as to the same, or substitute a new and distinct charge for one transmitted to him for trial by the proper superior.<sup>1</sup> II, 60, *March, 1863*; XXI, 56, *November, 1865*; 20, 278, *November, 1887*.

1533. The duty of the judge-advocate toward the accused should not be regarded as confined to the limited province of "counsel for the prisoner" as the same is defined in the 90th Article of War. Where the accused is ignorant and inexperienced and without counsel—especially where he is an enlisted man—the judge-advocate should take care that he does not suffer upon the trial from any ignorance or misconception of his legal rights, and has full opportunity to interpose such plea and make such defence as may best bring out the facts,

<sup>1</sup>See G. O. 64, Dept. of the Cumberland, 1867, do. 98, *id.*, 1868, do. 85, Dept. of the South, 1874, G. C. M. O. 36, 42, Dept. of the Platte, 1877, do. 11, *id.*, 1878, do. 48, Mil. Div. of Pacific & Dept. of Cal., 1880.

This paragraph sets forth the established practice. See Manual for Courts Martial (1901), p. 23, par. 2.

A competent judge-advocate will properly be left by the court to introduce the testimony in the form and order deemed by him to be the most advantageous, and generally to bring on cases for trial and conduct their prosecution according to his own judgment. Compare G. C. M. O. 97, Dept. of Dakota, 1878, do. 38, Dept. of Texas, 1878; and—as to the civil practice—United States v. Burr, 1 Burr's Trial, 85, 469; Lynch v. Benton, 3 Robt., 105; Davany v. Koon, 45 Miss., 71.

the merits, or the extenuating circumstances of his case. V, 577, *December, 1863*; LV, 182, *December, 1887*. The judge-advocate should advise the accused, especially when ignorant and unassisted by counsel, of his rights in defence—particularly of his right, if it exists in the case, to plead the statute of limitation (21, 156, *December, 1887*), and of his right to testify in his own behalf.<sup>1</sup> A failure to do so, however, will not affect the legal validity of the proceedings; though, if it appear that the accused was actually ignorant of these rights, the omission may be ground for a mitigation of sentence. LV, 182, *supra*.

1534. For the judge-advocate to counsel the accused, when a soldier or inferior in rank, to plead guilty, must in general be unbecoming and inadvisable. But where such plea is voluntarily and intelligently made, the judge-advocate should properly advise the accused of his right to offer evidence in explanation or extenuation of his offence, and, if any such evidence exists, should assist him in securing it. And where no such evidence is attainable in the case, the judge-advocate should still see that the accused has an opportunity to present a "statement," written or verbal, to the court, if he has any desire to do so.<sup>2</sup> V, 577, *December, 1863*.

1535. A judge-advocate of a court martial has no authority to place in arrest an officer or soldier about to be tried by the court, or to compel the attendance of the accused before the court by requiring a non-commissioned officer to bring him or otherwise: these are duties which devolve upon the convening authority or upon the post commander or other proper officer in whose custody or command the accused is at the time. XXVIII, 531, *April, 1869*.

1536. It is strictly the proper practice for a judge-advocate not to give his opinion upon a point of law arising upon a military trial, unless the same may be required by the court. This practice, however, is often departed from, and the opinions of judge-advocates, suitably tendered, are in general received and entertained by the court without objection, whether or not formally called for. But where the court *does* object to the giving of an opinion by the judge-advocate, he is not authorized to attempt to give it, and of course not authorized to enter it upon the record. Whether the *fact*—that the opinion was offered and objected to by the court—shall be entered upon the record, is a matter for the court alone to decide. It is, however, certainly the better practice that all the proceedings, even those that are irregular, which transpire in connection with the trial, should be set out

<sup>1</sup> See G. O. 75, A. G. O. 1887.

<sup>2</sup> See Manual for Courts Martial (1901) p. 23, par. 3; also Macomb's ed. of 1891, pp. 170, 171.

in the record for the inspection of the reviewing authority. XXVI, 251, *December, 1867.*

1537. It is one of the duties of the judge-advocate to prepare the "complete and accurate record" which "every court martial" is required by the Army Regulations to "keep." He should, if practicable, complete the record of each day's proceedings in time to be submitted to the court at the next day or next session for approval or correction. The record is the record *of the court*, and the judge-advocate is subject to the direction of the court in preparing it. XXI, 679, *November, 1866.*

1538. One of the functions of the judge-advocate of a court martial is the execution of its orders. If a court-martial adjourns subject to the call of the presiding officer, the judge-advocate is carrying out the orders of the court when notifying members of the time designated by the presiding officer for reassembling. LXVIII, 670, *April, 1885.*

1539. An absence of the judge-advocate from the court during the trial does not *per se* affect the validity of the proceedings, but is of course to be avoided if possible. When the judge-advocate is obliged to temporarily absent himself, the court should in general suspend the proceedings for the time; or, if his absence is to be prolonged, should adjourn for a certain period. XXI, 177, *January, 1866.* No one can assume his duties in his absence, except that the record of a meeting and adjournment in consequence of such absence would be made as the court might direct. Card 2059, *February, 1896.*

1540. Should the judge-advocate be required to give evidence as a witness, the clerk or reporter of the court may go on to record his testimony while on the stand; or, if there be no clerk or reporter, he may record his own testimony as that of any other witness. XXI, 177, *January, 1866.*

1541. A judge-advocate of a court martial may be detailed to perform other duty, as that of officer of the day or member of a board of survey, if such duty will not interfere with his duties as judge-advocate. But in general of course no duties, in addition to those incidental to his function as judge-advocate, should be imposed upon him pending an important trial. XXIX, 273, *September, 1869.*

1542. The judge-advocate in our practice is entitled to the closing argument or address to the court, and he may present an address although the accused waives his right to present any; the function of the judge-advocate, at this stage of the proceedings, not being confined merely to a *replying* to the accused. The court is not authorized to deny to the judge-advocate this right to be heard. XXXII, 429, *April, 1872; XLIX, 613, December, 1885.* The judge-advocate in his address is not authorized to read to the court evidence or written



statements not introduced upon the trial and which the accused has had no opportunity to controvert or comment upon. XXII, 238, *June, 1866*.

1543. The only authority for the employment of reporters for courts-martial is that contained in Sec. 1203, Rev. Sts., which authorizes the judge-advocate of a military court to appoint a reporter for such court. In view of this statute, *held* that the appointment, by a judge-advocate on the staff of a department commander, of a person to act as reporter for all the courts to be convened in the department, was in contravention of the statute. XI, 361, *January, 1865*.

1544. For the court or the president of the court to place or order the judge-advocate in arrest would be an unauthorized proceeding. The court indeed, in a proper case under Art. 86, might proceed against its judge-advocate as for a contempt. But an arrest could not be imposed nor a punishment executed in the case of such officer, except through the convening authority or other competent commander. III, 603, *September, 1863*; XXI, 629, *September, 1866*.

1545. Where the court was convened by a military officer—*as*, in a case of a general court, the general of the army or a department or army commander—it is the duty of the judge-advocate, upon the completion of the record, to transmit the same to such officer (or his successor in command) for the proper action. Where the court was convened by the President, it is the duty of the judge-advocate to transmit the completed proceedings directly to the Judge-Advocate General,<sup>1</sup> in order that he may exercise the revisory function reposed in him by Sec. 1199, Rev. Sts.<sup>2</sup> XLII, 457, *December, 1879*.

1546. The general presumption of law, made in favor of all public officers, in the absence of affirmative evidence to the contrary, that they duly fulfill their functions, applies to the judge-advocate. LV, 182, *December, 1887*.

1547. The act of July 27, 1892 (27 Stats., 278), requiring the withdrawal of the judge-advocate whenever the court sits "in closed session," *held* not to apply to a meeting of the court, had after judgment, to hear read the record of the findings and sentence, such proceeding being no part of the trial. 62, 363, *November, 1893*.

1548. The object of the legislation excluding the judge-advocate from closed sessions of a court-martial is not only that there should be no unfairness to the accused, but that there should be no possibility of

<sup>1</sup> See G. O. 72, War Dept., 1873; do. 30, Hdqrs. of Army, 1877.

<sup>2</sup> It may here be noted that the 113th Article of War, the only statute relating to the forwarding, by judge-advocates of the proceedings of general courts, is incomplete and not in harmony with the provisions of Arts. 104 and 109. The *practice* on the subject is now regulated by paragraph 802, Army Regulations of 1895, 1003 of 1901, which requires that "proceedings of all courts and military commissions appointed by the President" shall be sent direct to the Secretary of War.

such unfairness. The statute does not contemplate the exercise of any discretion by the court in the matter, nor does it admit of any exception being made to the procedure described and required, even though such exception be in favor of the accused. A strict compliance with its requirements is necessary, and a failure to comply with them would probably be held to vitiate the proceedings.<sup>1</sup> *Advised* therefore in the particular case, that if the court had not arrived at a finding, the court be dissolved, and a new one appointed for the trial *de novo* of the accused. Card 1637, *October, 1895*.

1549. A judge-advocate is authorized to subpoena witnesses only for testifying in court; he cannot summon a witness to appear before himself for preliminary examination. For this purpose he must procure an order to be issued by the proper commander. L11, 508, *September, 1887*.

1550. A judge-advocate has no authority to employ a civil official or private civilian to serve subpoenas, if by so doing the United States will be subjected to a claim for compensation. 32, 365, *May, 1889*; 51, 407, *January, 1892*. But see §§ 2470 and 2471, *post*.

1551. Sec. 1202, Rev. Sts., authorizes only judge-advocates of courts-martial to issue process to compel the attendance of witnesses. The court itself—general or inferior—has no such power. L, 632, *August, 1886*; 51, 468, *January, 1892*. But the judge-advocate is authorized only to *initiate* the process of attachment. The statute does not specify by whom it shall be executed, and the judge-advocate is not authorized to command any officer or person to serve it; nor has the court any such power.<sup>2</sup> L, 632, *supra*.

1552. A judge-advocate, having attached a civilian witness and had him brought to the place of the court, detained him one hour in the guard house before bringing him before the court. For this he was indicted (for false imprisonment) in a U. S. district court in Texas. *Held* that his action was warranted under Sec. 1202, R. S., and *advised* that the Attorney General be requested to cause the prosecution to be discontinued. L, 191, *April, 1886*.

1553. The judge-advocate, in forwarding the interrogatories for a deposition, should transmit with them a subpoena (in duplicate) requiring the witness to appear at a stated place and date before a certain person who is to take the deposition. Particulars not ascertained may be left blank to be supplied by the officer or person by whom the subpoena is served. When the deposition has been duly taken and returned, the judge-advocate should transmit to the witness (or to some officer,

<sup>1</sup> See *held* in cases published in S. O. 19, Dept. of Colorado, 1896; and S. O. 23, Dept. of the East, 1896.

<sup>2</sup> Par. 923, A. R. (1026 of 1901), makes provision on this point.

&c., for him) the usual certificate of attendance (accompanied by a copy of the convening order), the duration of the attendance to be ascertained from the deposition. LV, 384, *March, 1888*.

1554. Affidavits required to be taken in the execution of contracts pertaining to military administration may be taken before the judge-advocates and other officers named in the act of Congress approved July 27, 1892. This act having been passed subsequent to the enactment of Sec. 3745, Rev. Sts., modifies the latter to the extent stated. Cards 3671, *November, 1897*; 3768, *January, 1898*.

#### JUDGE-ADVOCATE GENERAL.

1555. The work done in his office and for which this officer is responsible consists mainly of the following particulars: Reviewing and making reports upon the proceedings of trials by court-martial of officers, enlisted men and cadets, and the proceedings of courts of inquiry; making reports upon applications for pardon or mitigation of sentence; preparing and revising charges and specifications prior to trial, and instructing judge-advocates in regard to the conduct of prosecutions; drafting of contracts, bonds, &c., as also—for execution by the Secretary of War—of deeds, leases, licenses (see LICENSE), grants of rights of way, approvals of location of rights of way, approvals of

"The Judge-Advocate-General's Department now consists of the Judge-Advocate-General and eleven judge-advocates (two of the rank of colonel, three of the rank of lieutenant-colonel, and six of the rank of major), and of as many acting judge-advocates (temporarily detailed with the rank of captain) as may be necessary to supplement the regular officers so that "each geographical department or tactical division of troops" may be supplied with a judge-advocate. See sec. 15 of the act "to increase the efficiency of the permanent military establishment," approved February 2, 1901, published in G. O. 9, A. G. O., 1901.

The Secretary of War (Stanton), under date of November 13, 1862, defined the duties of a judge-advocate of the corps of judge-advocates appointed under section 6 of the act of July 17, 1862 (12 Stats., 598), as follows:

"Your duties will be—

"1. Those pertaining to the office of judge-advocate under the general military law as defined in the standard works of military jurisprudence.

"2. To advise and direct all provost-marshals or other ministerial officers, civil or military, in the police or other duties that may be directed by the orders of the War Department, or commanding general, or by the Judge-Advocate-General from time to time.

"3. Such other special duties in regard to state prisoners and measures relating to the national safety as may be assigned you by the Department, by the commanding officer, or by the Judge-Advocate-General.

"4. To advise the War Department, through the Judge-Advocate-General, upon all matters within your military district whenever you may deem the action of the Department important to the national safety and the enforcement of the laws and Constitution.

"5. To apply for special instructions to the commanding general upon such matters as may need special instruction to guide your action.

"6. To report to the commanding general all disloyal practices in your district, and when prompt action is required, take such measures [as may be necessary] through the provost-marshal, military commandant, or other authority to suppress them."

plans of bridges and other structures, notices to alter bridges as obstructions to navigation, &c.; framing of bills, forms of procedure, &c.; preparing of opinions upon questions relating to the appointment, promotion, rank, pay, allowances, &c., of officers, enlisted men, &c., and to their amenability to military jurisdiction and discipline; upon the civil rights, liabilities and relations of military persons and the exercise of the civil jurisdiction over them; upon the employment of the army in execution of the laws; upon the discharge of minors, deserters, &c., on *habeas corpus*; upon the administration of military commands, the care and government of military reservations, and the extent of the U. S. and State jurisdictions over such reservations or other lands of the United States; upon the proper construction of appropriation acts and other statutes; upon the interpretation and effect of public contracts between the United States and individuals or corporations; upon the validity and disposition of the varied claims against the United States presented to the War Department; upon the execution of public works under appropriations by Congress; upon obstructions to navigation as caused by bridges, dams, locks, piers, &c.; upon the riparian rights of the United States and of States and individuals on navigable waters, &c., &c.; and the furnishing to other departments of the Government of statements and information apposite to claims therein pending, and to individuals of copies of the records of their trials under the 114th Article of War. The matter of submitting to the Judge-Advocate General applications for opinions is regulated by par. 852, A. R. (768 of 1895; 853 of 1901). 37, 14, *November, 1889.*

1556. It is contrary to the practice of the Judge-Advocate General's Office to give, upon request of the military officers or the officials of a State, opinions on questions arising in the military administration of the State. Cards 685, *November, 1894*; 1287, *April, 1895.* Similarly held with respect to requests made directly to the Judge-Advocate-General for opinions upon questions relating to any other internal affairs of a State. Card 578, *October, 1894.*

1557. The reports of the Judge-Advocate General to the Secretary of War have always been regarded as confidential communications and it has not been the practice to furnish copies of them to parties outside the department in the absence of special authority from the Secretary of War. Cards 663, *December, 1894*; 4013, *July, 1898,* and *March, 1899.*

1558. The Judge-Advocate General has no administrative jurisdiction over claims of parties employed to report the proceedings of court-martials. Card 6191, *April, 1899.*



## L.

## LAND.

1559. As between the United States and a State, the soil of the bed of navigable waters and of the shores of tide waters below high-water mark, or—on rivers not reached by the tide—the soil of the shores below the ordinary water line (as not affected by freshet or unusual drouth), belongs to the State. See §§ 1711 and 1773, *post*. But natural accretions to land owned by private individuals belong to the owners of the land. Thus, *held* that the accretions to Hog Island in the mouth of the Missouri River belonged, not to the United States or to the State of Missouri, but to the owner of the island. LI, 636, *March, 1887*.

1560. Where land proposed to be conveyed by a State to the United States for the purpose of fortifications was described in the proffered deed as extending to the sea and in a line along the sea, *held* that such a deed would convey only land extending to and bounded by high-water mark, and advised that the grant should be so expressed as specifically to include the shore to low-water mark, and should also embrace such water-covered lands as would be sufficient to prevent the erection by the authority of the State of structures that might interfere with the proper use of the land for purposes of fortifications. 64, 249, *March, 1894*.

1561. Where certain land, part of the battlefield of Gettysburg, was in danger of being so cut up and altered by the construction of an electric railroad as to cause the obliteration of important tactical positions occupied by different commands engaged in the battle, *advised* that the Attorney General be requested to have initiated the proper proceedings for the condemnation of the land so that the United States may acquire the fee, and for an injunction restraining the railroad company from constructing or operating its road upon the land pending the condemnation proceedings.<sup>1</sup> 64, 411, *April, 1894*.

1562. *Held* that the granite monument erected by the United States, under an appropriation by Congress for the purpose, on land belonging to the State at Newburg, New York, and known as Washington's Headquarters, became, in the absence of any provision in the statute or agreement with the State, the property, as a fixed improvement, of that State. 49, 20, *August, 1891*.

<sup>1</sup> Compare subsequent opinion of Attorney-General, in 20 Opins., 628.

## LARCENY.

**1563.** *Held* that grass cut for hay upon a military reservation was in law, at least if not at once removed, personal property, so that a person wrongfully cutting such grass and allowing it to remain till it became hay or for any material period before asportation, was chargeable with a stealing of property of the United States under the act of March 3, 1875, c. 144, which makes such stealing a felony punishable by fine and imprisonment. **64**, 270, 303. *March and April, 1894.*

**1564.** A soldier, contemplating desertion, borrowed from another soldier, on the day of his absenting himself, a blouse, which he thereupon proceeded wrongfully to dispose of. *Held* that if, as was quite evidently the fact, he had, at the time of borrowing, the intention to appropriate, he was chargeable with larceny, since the owner, in lending, consented to part with the possession only, not the property. **60**, 165. *June, 1893.*

**1565.** A soldier was charged with the larceny of a certain sum of money in currency from the post trader's store. At his arrest a sum in currency of about the same amount, but not capable of identification as the same money, was found on his person, and, being claimed by the trader, was turned over to him by the post commander. The soldier was then tried and acquitted. *Held* that the post commander should refund to the soldier the amount taken from him and improperly turned over to the trader. **L**, 520. *July, 1886.*

**1566.** Where a State statute imposed the disability of loss of the right of suffrage upon persons convicted of larceny, *held* that the conviction intended was conviction by a civil court, and that a conviction of this crime by a court-martial (convened within the State) would not work such disability, or—to enable the soldier, upon his discharge, to vote in the State—require a pardon by the President. **27**, 65. *September, 1888.*

LAW OF WAR.<sup>1</sup>

**1567.** The law of war is, in brief, the law of military government and authority as exercised in time of war, foreign or civil. Its usual field is the territory of a conquered country in the occupation of a hostile army; it is sometimes extended however, though generally in a milder form, to localities under "martial law." See § 1639, *post*. It is properly a part of the law of nations, though its application may be materially varied by the circumstances of the country or the people brought under its sway.

<sup>1</sup> See Bishop's Criminal Law, seventh edition, §§ 809 and 813.

<sup>2</sup> See Manual for Courts-Martial (1901), Introduction, Sec. 1.

It is a fundamental principle of the law of war that, during a state of war, all commercial intercourse between the belligerents is interdicted and made illegal except when and where it may be expressly authorized by the Government. During the civil war, which, as respects the application in general of the laws and usages of war, was assimilated to a foreign war,<sup>1</sup> all trade and intercourse with the enemy, except so far as permitted by the President under authority from Congress (or in rare cases by a commanding general in the field representing the President) was necessarily suspended.<sup>2</sup> XI, 533, 647, 651, *March* and *April*, 1865; XII, 259, *January*, 1865; XIV, 241, *March*, 1865; XVI, 572, *September*, 1865; XIX, 673, *July*, 1866; XXX, 346, *May*, 1870.

1568. As to the principal forms of violation of the law of non-intercourse, and other violations of the laws of war, made the subject of trial by military commission during the civil war, see § 1682, *post*.

1569. Where a chaplain of the Confederate army came within the lines of the U. S. army during the war without the authority of the Federal government, and was apprehended, tried and convicted of the offence involved, and sentenced (December, 1864) to be confined during the war, *advised* that while his act was in violation of the law of war, yet, as it appeared that his only object in coming within our lines was to purchase bibles, his punishment might well be remitted on his taking the usual oath of allegiance to the Federal government. XI, 553, *March*, 1865.

1570. Offences against the law of non-intercourse between the belligerents in time of war are no less such when committed by foreigners than when committed by citizens. Thus where certain persons made their way early in the civil war from Scotland to South Carolina, engaged for a considerable period in the manufacture of treasury notes for the Confederate authorities, and at the end of their employment came secretly and without authority into our lines with the design of returning to their home,—*held* that, though British subjects, they had

<sup>1</sup> See Prize Cases, 2 Black, 606-9; *Dow v. Johnson*, 10 Otto, 164; *Brown v. Hutt*, 1 Delan., 372; *Philippe v. Hatch*, *id.*, 571; *Sanderson v. Morgan*, 39 N. York, 251; *Parkins v. Rogers*, 35 Ind., 124; *Leathers v. Com. Ins. Co.*, 2 Bush, 630; *Hodges v. Price*, 2 West Va., 192.

<sup>2</sup> The *Ouachita Cotton*, 6 Wallace, 521; *Coppell v. Hall*, 7 *id.*, 542, 554; *McKee v. United States*, 8 *id.*, 163; *United States v. Grossmayer*, 9 *id.*, 72; *Montgomery v. United States*, 15 *id.*, 395; *Hamilton v. Dillin*, 21 *id.*, 73; *Mitchell v. United States*, *id.*, 350; *Matthews v. McStea*, 1 Otto, 7; *Dow v. Johnson*, 10 *id.*, 164; *Kershaw v. Kershaw*, 100 Mass., 561; *Lieber's Instructions*, G. O. 100, War. Dept., 1863, par. 86. Besides the suspension incident to the state of war, a suspension of commercial intercourse with the enemy was specially directed by act of Congress of July 13, 1861, and proclaimed by the President on Aug. 16, 1861. By authority conferred by the same statute, general regulations, concerning commercial intercourse with and in the States declared in insurrection, were approved by the President, January 26, 1864, and published in G. O. 53, Dept. of the Gulf, of April 20, 1864.

identified themselves with the cause of the enemy, and were properly amenable to trial for the offence of penetrating our military lines in violation of the laws of war. XV, 112, *March, 1865*.

1571. Where a party arrested in attempting without authority to cross the Potomac for the purpose of holding communication with persons in the enemy's country, was ordered by the department commander—his offence having been committed in a district in military occupation—to be placed under military surveillance and to furnish a bond with sufficient sureties, obliging him not to attempt again during the war to join or hold intercourse with the enemy,—*held* that such proceeding was warranted by the laws and customs of war. III, 255, *July, 1863*.

1572. Two soldiers of the United States army having been seized and delivered across the lines to the enemy by a party of *civilians* in a portion of one of the insurrectionary States in the occupation of the Federal forces, an equal number of citizens of the district were ordered by the commanding general to be arrested and held till the offenders, who meanwhile had taken refuge with the enemy, should be surrendered for trial. *Held* that such an act of retaliation was warranted by the laws and usages of war. IX, 210, *June, 1864*.

1573. There can be no doubt as to the authority of the commander of an army, in occupation and government of the enemy's country, to suppress a newspaper or other publication deemed by him to be injurious to the public interests in exciting opposition to the dominant authority or encouraging the support of the enemy's cause on the part of the inhabitants. A newspaper may be a powerful agent for such a purpose, and, when it is so, it may under the laws of war, as legally be silenced as may a fort or battery of the enemy in the field. II, 585, *June, 1863*.

1574. *Held*, that a system of correspondence which had been concerted and maintained between northern and southern newspapers by means of an interchange of published communications entitled "Personals," was an evasion of the rule interdicting intercourse with the enemy in time of war, and, not being within the regulations established for correspondence by letter between the lines by flag of truce, should not, however innocent might be many or most of the communications, be sanctioned by the Government, but that the proprietors of the northern newspapers concerned should be notified that unless the practice were discontinued, they would be liable to be proceeded against for promoting correspondence with the enemy in violation of the laws of war or of the special act of February 25, 1863.<sup>1</sup> XII, 259, *January, 1865*.

<sup>1</sup>See G. O. 10, Dept. of the East, 1865.



1575. The taking possession, by the order of the commander of the military department at New Orleans, for the use of the military service in the prosecution of the war, of moneys belonging to enemies, on deposit in the banks of that city, while occupied (in 1863) by our army, *held* an act justified by the strict law of war.<sup>1</sup> XIX, 612, *May, 1866*. Contributions of money exacted from the enemy by competent military authority, being justified by the law of war and conquest,<sup>2</sup> *held* that a tax of five dollars per bale, levied (in 1864) by the military commander at New Orleans, Gen. Canby, upon cotton brought into that city, and applied to hospital, sanitary and charitable purposes, was authorized under the discretionary power with which such a commander was properly invested in time of war.<sup>3</sup> XVIII, 668, *March, 1866*.

1576. It is a principle of the law of war that the municipal laws of a conquered country continue in force during the military occupation by the conqueror, except in so far as the same may necessarily be suspended or their operation be affected by his acts.<sup>4</sup> So, where a testator had executed, in Vicksburg, Mississippi, after its capture and during its occupation by our forces, a will devising real estate; but such will, in not being attested by the required number of witnesses, was invalid under the State law; *held*, that as this law was in no respect modified upon the capture, the devisee under the will, however loyal, could not properly be invested by military authority with the legal title to such estate against the heirs at law. XIX, 474, *March, 1866*.

1577. It is authorized by the laws of war for a military officer commanding in time of war in a region in military occupation, and where

<sup>1</sup>See *New Orleans v. Steamship Company*, 20 Wallace, 394; *Witherspoon v. Farmers' Bk.*, 2 Duvall, 497. But in *Planters' Bank v. Union Bk.*, 16 Wallace, 483, this particular order was held to have been an exceeding of authority, not because unauthorized by the law of war, but for the reason that a previous commander—Gen. Butler—by his proclamation on first occupying the city, of May 1, 1862, had pledged the Government to the holding inviolate of all rights of property. And see *The Venice*, 2 Wallace, 258.

<sup>2</sup>*Lewis v. McGuire*, 3 Bush, 202; *Clark v. Dick*, 1 Dillon, 8. And see Maj. Gen. Scott's order (G. O. 395, *Hqrs. of Army*, 1847) levying assessments upon Mexican communities for the support of the military government and occupation.

<sup>3</sup>See *Hamilton v. Tiffin*, 21 Wallace, 73.

<sup>4</sup>By the well recognized principles of international law, the mere military occupation of a country by a belligerent power or a conqueror, does not *ipso facto* displace the municipal laws. "Such conqueror or belligerent occupier may suspend or supersede them for the time being, but, in the absence of orders to that effect, they remain in force." *Wingfield v. Crosby*, 5 Coldw., 246. "Supreme military authority in a city is not incompatible with the existence and authority of courts of civil jurisdiction and procedure." *Pepin v. Lachenmeyer*, 45 N. York, 27. And see *Kimball v. Taylor*, 2 Woods, 37; *Rutledge v. Fogg*, 3 Coldw., 554; *Heffernan v. Porter*, 6 *id.*, 391; *Murrell v. Jones*, 40 Mass., 506; *Dow v. Johnson*, 10 Otto, 158, 166. But where the courts of a hostile country are left open by the conqueror, it is only the citizens of such country that are subject to their jurisdiction; the officers and soldiers of the occupying army are in no manner amenable to the same. This principle was illustrated by the Supreme Court in the cases of *Coleman v. Tennessee*, 7 Otto, 509; *Dow v. Johnson*, *supra*.

the ordinary courts are closed by the exigencies of the war, to appoint a special court or judge for the determination of cases not properly cognizable by the ordinary military tribunals. In the civil war such courts were not unfrequently constituted and were commonly designated *provost courts*. II, 14, *February, 1863*; XV, 519, *July, 1865*. Such courts had no jurisdiction of purely military offences (*i. e.* offences which the Articles of War make cognizable by court-martial), and were therefore not properly authorized to impose forfeitures of pay or other strictly military punishments upon officers or soldiers of the army. VI, 635, *December, 1864*; VIII, 638, X, 39, 560, and XIII, 55, 114, *July to December, 1864*. These courts were in general resorted to as substitutes for the ordinary police courts of cities, and their jurisdiction was in general confined to cases of breaches of the peace and of violation of such civil ordinances or military regulations as might be in force for the government of the locality.<sup>1</sup> XIII, 392, *February, 1865*.

1578. *Held* that a person taking photographs of fortifications in time of war runs the risk of being treated as a spy, or at the least of doing a thing forbidden by the law of war. His arrest outside the limits of a military reservation would not be a trespass; nor would the seizure and retention of the photographic plates be unlawful. Their retention would be proper though no notice to the public prohibiting the taking of such photographs had been given. Card 4784, *August, 1898*.

1579. Under the law of war a government by military occupation has no power to alienate immovable property so as to render such aliena-

<sup>1</sup> Some of these courts, however, took cognizance, in the course of their existence, of cases of very considerable importance, civil as well as criminal. See the following General Orders establishing or relating to Provost Courts and similar tribunals: G. O. 41, Dept. of Virginia, 1863, do. 45, Dept. of the Gulf, 1863, do. 6, 77, *et. 1864*; do. 103, 116, Dept. of Washington, 1865, do. 39 *et. 1866*; do. 102, Dept. of the South, 1865; do. 30, 38, 49, 68, Dept. of S. Carolina, 1865, do. 37, *et. 1866*, do. 31, Dept. of the Mississippi, 1865; do. 12, Dept. of Arkansas, 1865, do. 5, Mil. Div. of the James, 1865; do. 31, First Mil. Dist., 1867; Circ., Second *id.* May 15, 1867; G. O. 29, 61, *et. 1868*; do. 4, Fifth *et. 1869*; also Gen. Wood's G. O. 516 of 1847.

While the majority of these special tribunals were confined to the exercise of such functions as are commonly devolved upon police or justices' courts, their authority, when empowered for the purpose by a competent military commander, to take cognizance of important civil actions has been affirmed by the Supreme Court of the United States in the case of *Mechanics' & Traders' Bk. v. Union Bk.*, 22 Wall., 276, in which a "Provost Court," established at New Orleans by an order of the department commander, of May 1, 1862, was held to be a lawful tribunal, and a judgment rendered by it in an action for the recovery of \$150,000, money borrowed by one bank from another, was recognized as legal. See this case also in 25 La. An. 387.

So, the authority of the "Provisional Court of Louisiana" (which succeeded the "Provost Court" last in listed), and was established by the President, in an Executive Order of Oct. 20, 1862, to determine a cause in admiralty, was affirmed by the United States Supreme Court in *The Compañet*, 9 Wallace, 129, and later its jurisdiction in civil action on a mortgage debt was recognized by that tribunal in *Burke v. Miltenberger*, 19 Wallace, 519. And see the same case, as *Burke v. Tregree*, in 22 La. An. 629. The authority of the same court to take cognizance of a case of murder and one of arson (as also of civil controversies) was maintained in an elaborate

tion effective after the re-instatement of the former government.<sup>1</sup> And it would seem that the same rule should apply to the granting of franchises for railways, electric light plants, etc. Whether the effect of a treaty of peace substituting the sovereignty of the United States for that of the former government would be to render such alienations and grants binding is doubtful. Upon this point the authorities do not seem to agree, but it is laid down in the "Instructions for the Government of the Armies of the United States in the Field" (G. O. 100, A. G. O. 1863, par. 31) that "a victorious army appropriates all public money, seizes all public movable property until further direction by its government and sequesters for its own benefit or that of its government, all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation and until the conquest is made complete." If the title to real property is in abeyance as stated, it would seem that the military authorities would be without power to make an alienation of it by the granting of franchises or otherwise which would be valid after the termination of the government by military occupation. Card 5076, *September, 1898*; 5457, *December, 1898*.

1580. Anything that may properly be made a law of a military government, and which is promulgated in any effective way that the supreme military commander may see fit to promulgate it, becomes a valid law of that government on being so promulgated and must be obeyed by all persons within the territory. No rules or laws that may have been in force in the territory prior to its military occupation can compel the commander to adopt any particular manner of promulga-

tion of its judge, Hon. C. A. Peabody (in 1863), in the cases of the United States *v. Reiter & Louis*, reported in 13 Am. Law Reg. 534.

The civil jurisdiction of a similar *war* court—the "Commission" established by the department commander in Memphis in 1863—was similarly recognized in *Hoffman v. Porter*, 6 (oldw. 39). And as to the full authority of this tribunal as a substitute for the ordinary civil courts of the locality, see also *State v. Stillman*, 7 *id.* 341. But see, *contra*, *Walsh v. Porter*, 12 *Heisk.* 401.

In the cases thus sustaining the action of special tribunals during the civil war, the courts in general refer to the earlier and leading case of *Leitensdorfer v. Webb*, 20 Howard, 176, in which was affirmed the authority of the courts established in 1846 in New Mexico as a part of the system of civil government instituted by Gen. Kearney, the military commander. With this case consult also *United States v. Rice*, 4 Wheaton, 254; *Cross v. Harrison*, 16 Howard, 164.

The reasoning upon which the above cited later rulings are based is,—that the authority to create courts with a civil as well as a criminal jurisdiction in a conquered country in military occupation attaches to the dominant power by the law of war and of nations as an incident to the power to establish a military government, that it is not only the right but the duty of the conqueror to institute such courts "for the security of persons and property and for the administration of justice"; and that when during the civil war such courts were created by commanding generals—such as the commanders of separate departments or armies—the order of the commander was to be presumed to be the order and act of the President.

Wheaton Int. Law, third Eng. edition by Boyd p. 469; Hall's Int. Law, fourth edition, 482-508; Birkhimer's Military Government and Martial Law, 197.

tion of the rules enjoined by him. The chief commander in the territory governed by military government does not fill any office or position that formed a part of the government of the country prior to the military occupation; nor is he bound by any rules or laws relating to the performance of official duties by any governor or other officer of the government displaced. Card 5978, *May, 1898*.

1581. As a result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless the latter sees fit to substitute for them other rates or modes of contribution to the expenses of the government. So, *held* that the President acted clearly within his powers when under date of August 8, 1898, as commander-in-chief of the army and navy he ordered and directed what the tariff and duties to be levied and collected *as a military contribution* upon the occupation and possession of any ports and places in the Island of Cuba by the forces of the United States should be; that regulations for the administration of such tariff and duties should take effect and be in force in the ports and places when so occupied; and that questions arising under said tariff and regulations should be decided by the general in command of the United States forces in said island. Card 5268, *November, 1898*.

1582. The destruction or injury of private property in battle or the bombardment of cities and towns has to be borne by the sufferers as one of the consequences of war. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, may be lawfully ordered by the commanding general. The necessities of war justify all this. The safety of the State in such cases overrides all considerations of private loss. *Salus populi* is then in truth *suprema lex*.<sup>1</sup> So *held* that the United States was not legally responsible for damages to the house of a resident and citizen of Santiago, Cuba, caused "by a shell fired from an American war ship on or about the fifth day of July, 1898, during the bombardment of the city." Card 5619, *January, 1899*.

1583. Under the terms of the protocol of August 12, 1898, and of the Treaty of Peace, signed at Paris on December 10, 1898, all of the immovable property on the island of Porto Rico belonging to the general government and as such "to the Crown of Spain" together with certain property in the nature of public records was ceded to the United States. All other movable property of the general government for which no special provision was made either in the protocol

<sup>1</sup> See U. S. v. Pacific Railroad, 120 U. S., 227, and authorities cited.



or treaty remained the property of Spain to be disposed of as desired by the latter. Certain articles of this movable property (office furniture) which it appeared had been, like the public buildings and other public works of the island, paid for from appropriations collected from the island, were ordered purchased from the Spanish government out of the insular funds collected by the United States. *Held* that the payment could legally be made as ordered, the property belonging to Spain and not to the "island government," there never having been an independent government for Porto Rico. Card 6828, *August, 1899*.

**1584.** When the treaty of peace with Spain took effect, April 11, 1899, the military government was in control in Porto Rico, and rightfully continued as the *de facto* government of the island exercising both executive and legislative powers,<sup>1</sup> subject to such constitutional limitations as were applicable. As the island had become territory of the United States, under the treaty, the Secretary of War was without power in the absence of congressional authority to alienate any part of the public domain, but *held* that he could, as representative of the President, lawfully license the temporary use of the same during the occupancy and government of the island by the military authorities.<sup>2</sup> Card 6990, *November, 1899*.

## LEASE.

**1585.** By the River and Harbor Act of August 5, 1886, the United States formally accepted from the State of Ohio the Muskingum River Improvement, with all its franchises, appurtenances, water rights, &c., subject to any existing leases of water rights under leases granted by the State. The State, by its official representative, had made a lease to certain individuals which contained a clause providing for a forfeiture of the lease in case of an assignment without the sanction of the lessor. The lease was assigned to a third party without any formal sanction or concurrence on the part of the lessor, but the lessor, subsequently to the assignment, accepted rents from the assignee. *Held* that such acceptance amounted to an absolute waiver of the forfeiture clause, and made the lease valid in the hands of the assignee, investing him with all the rights of the original lessees,<sup>3</sup> and was therefore binding upon the United States under the reservation of the act. 22, 45, *January, 1888*.

**1586.** The act of Congress approved Aug. 11, 1888 (25 Stats. 417), authorized the Secretary of War "to grant leases or licenses for the

<sup>1</sup> *Cross v. Harrison*, 16 Howard, 164, 193.

<sup>2</sup> See Opinion of Atty. Genl. of July 26, 1899 (22 Opns., 544).

<sup>3</sup> Taylor's Landlord and Tenant, § 497.

use of the water powers on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable and expedient \* \* \* and \* \* \* to grant leases or licenses for the occupation of such lands belonging to the United States on said Muskingum River as may be required for mill sites or for other purposes not inconsistent with the requirements of navigation." Under this statute two leases for periods of twenty years each were granted, but neither provided for a forfeiture of the term for non-payment of rent. *Held*, therefore, that the Secretary of War could not terminate them on account of non-payment of rent;<sup>1</sup> and *advised* that the proper way to terminate them would be to have the lessees execute instruments surrendering their terms. Card 2096, *March, 1896*. See card 3242, *January, 1900*.

1587. Where a lease made to the United States, of land to be used for public purposes, contained no stipulation other than one for the payment of certain rent, *held* that such lease was not annulled by transfer under Sec. 3737, Rev. Stat., but was legally assignable. The case is deemed to be governed by the ruling of the Supreme Court in *Freedman's Saving Co. v. Shepherd*,<sup>2</sup> to the effect that Sec. 3737 did not apply to a lease so made, "under which the lessor is not required to perform any service for the Government, and has nothing to do in respect to the lease except to receive from time to time the rent agreed to be paid." 43, 175, *October, 1890*.

1588. Where rent was due by the United States for the occupation of a house which it had leased for a recruiting rendezvous, and the title to the premises was claimed both by the lessor and another person as parties to a pending suit in a court of chancery, *advised* that if the rights of the parties to the rent were so involved in the litigation as to enable the United States to pay the amount of the rent into court and receive an acquittance therefor, this course would properly be pursued; otherwise that the payment should be withheld entirely until the question of title be determined and the United States be enabled to receive a final receipt from one of the parties or both jointly. 64, 15, 300, *February and April, 1894*.

1589. Where land was leased by the United States for a target range in the State of Texas and the lease contained a covenant for renewal at the end of the year at the option of the United States, *held* that unless the lease were acknowledged (or proved) and recorded as provided by the Statutes of Texas, such covenant would not be binding upon a purchaser for value without notice thereof.<sup>3</sup> Card 2439, *July, 1896*.

<sup>1</sup> Taylor's Landlord and Tenant, eighth ed., § 489; Am. and Eng. Ency. of Law, 1st edition, vol. 12, p. 758d.

<sup>2</sup> 127 U. S., 494, 4 C. Imp. Dec., 43.

<sup>3</sup> As to how a lease containing a covenant for renewal should be renewed, see § 882, *note*.

1590. Under the act of Congress approved July 28, 1892 (27 Stats. 321), the Secretary of War has authority, when in his discretion it will be for the public good, to lease for a period not exceeding five years and revocable at any time such property of the United States under his control as may not for the time be required for public use, and for the leasing of which there is no authority under existing law, provided that nothing in the act should be held to apply to mineral or phosphate lands. Under this act revocable leases have been granted in a number of instances. Cards 851, *January and April, 1895*; 1790, *November, 1895*; 2102, *March and October, 1896*; 4100, *May, 1898*. In practice the leases or assignments thereof are required to be in duplicate. Cards 178, 179, *August, 1893*; 414, *October, 1893*. Under the express terms of the act the Secretary of War has no authority to lease mineral or phosphate lands. Cards 3619, *November, 1897*; 6389, 6721, *May and July, 1899*. In a certain class of cases, to wit, where the parties applied for permission to construct certain buildings upon reservations and to build docks in a government harbor, revocable leases were granted in lieu of licenses.<sup>1</sup> Cards 3350, 3356, 3378, *July, 1897*.

1591. As there is no law requiring the Secretary of War to call for bids in leasing property under the act of July 28, 1892, the amount for which it shall be leased rests in his discretion. Card 273, *September, 1893*.

1592. The Secretary of War leased a part of a military reservation, the rent to be paid monthly during the continuance of the lease. The lease provided that the term should be three years from the twelfth day of July, 1894, but it was not in fact executed by the Secretary until Sept. 12, 1894. The lessee entered upon the reservation about the latter date and vacated the same on July 12, 1897, the date of the termination of the lease. *Held* that in point of *computation* the three years term dated from July 12, 1894, but that in point of *interest* the lease took effect only from the delivery of the instrument, and that therefore rent could be collected for only about two years and ten months.<sup>2</sup> Card 273, *July and October, 1897*.

#### LEAVE OF ABSENCE.

1593. The provision of the act of July 29, 1876, to the effect that officers shall enjoy the extended leaves of absence accorded by the act, "without deduction of pay or allowance," *held* to entitle such officers to receive their allowance for *quarters*, as well as their full pay for and

<sup>1</sup> See Opins. Atty. Gen. of May 19, and July 2, 1897, 21 Opins., 337, 565.

<sup>2</sup> See Taylor's Landlord and Tenant, eighth ed., § 70.

during the period of absence. The word "allowance" must mean something must mean some pecuniary emolument distinct from pay; and the *only* allowance or pecuniary emolument allowed to officers, at the date of the act or since, is the allowance for quarters.<sup>1</sup> XLIII, 277, *April, 1880*.

1594. *Held*, in estimating the period of the leave of absence to which a certain officer would be entitled under the provisions of Sec. 1265, Rev. Sts., and the act of July 29, 1876, without incurring a deduction from his pay, that a period during which he was permitted to be absent from his post, while under a sentence of suspension from rank, was not properly to be taken into account; such absence not being an absence of an "officer on duty" in the sense of the act of 1876, but an absence pending the execution of a sentence which, during its term, separated the officer from all duty. XLII, 306, *May, 1879*.

1595. Where an officer was granted by his department commander a specific leave of absence from his station, and was thereupon furnished with an order to proceed on a special detail to Washington, with authority to date his leave from his arrival at Washington; *held* that he was not thereby authorized to consider his leave as terminating at Washington, or his case as excepted from the general rule of par. 176 of the Army Regulations, which requires that the expiration of an officer's leave "must find him at his station;" and therefore that, on his return to Washington at the end of his leave, he did not revert to the status of being on duty, and was not entitled to an order (drawing mileage) to return to his station, but was in a status of being absent without leave, and was subject to a consequent loss of pay till he duly reported at his station.<sup>2</sup> XLIII, 281, *April, 1880*.

1596. *Held* that G. O. 77 of 1886, and par. 1460, A. R. (1317 of 1895; 1468 of 1901), constituted a correct interpretation of the act of July 29, 1876, and a rule of application now to be observed in all cases of officers availing themselves of the privilege of *cumulative* leave of absence. 44, 271, *December, 1890*.

1597. *Held* that the Chief of Engineers was not a "department commander" within the meaning of A. R. 46 (see 56 of 1901) and was therefore without authority to grant leaves of absence to officers stationed at Willets Point, N. Y. Card 15, *July, 1894*.

1598. *Held* that to allow such student officers on duty at Fort Leavenworth, Kansas, as have made satisfactory records to absent themselves during the vacation after the June examinations at the end of

<sup>1</sup> A counter opinion of the Solicitor-General, in 16 Opins. At. Gen., 619, was not adopted by the Secretary of War. See par. 1337, A. R. of 1865 (1491 of 1901).

<sup>2</sup> Compare opinion Court of Claims in *Andrews v. United States*, 15 Ct. Cls., 204. As to the right to *mileage* of an officer whose leave of absence is terminated by an order requiring him to return to his station, &c., see §§ 1609, 1671, *post*.



the first year without having such absences counted as regular leaves, would be inconsistent with the legislation of Congress on the subject of full pay leaves of absence and would amount to a substantial evasion of the law in any case where the granting of such a privilege would have the effect of allowing full pay absence in excess of what the law authorizes. Card 2307, *May, 1896*.

## LICENSE.

**1599.** A license is defined as a bare authority to do a certain act or series of acts upon the land of the licensor without possessing or acquiring any estate therein.<sup>1</sup> L, 619, *August, 1886*. The Secretary of War may, by revocable license, permit a temporary use, terminable at his discretion, as the public interests may require, of U. S. lands under his control, provided such license conveys no usufructuary interest in the land,<sup>2</sup> and such use does not conflict with the purpose for which the land is held. XLIX, 490, *November, 1887*; Cards 283, *September, 1894*; 2961, *February, 1897*. The Secretary of War may grant to a civilian, not a government employee, a revocable license to reside and do business on a military reservation. Cards 304, 315, *September, 1894*. A formal acceptance of a license is not in general necessary: the grantee, by acting under it, sufficiently indicates its acceptance. 59, 418, *May, 1893*; Cards 155, *December, 1894*; 639, *March, 1895*.

**1600.** An instrument termed a revocable license, but which in effect is a grant of an interest, is in excess of executive authority and inoperative. Thus an executive permit to erect upon U. S. land a building amounting to a permanent improvement to be used and occupied, or disposed of, by the licensee at his discretion as his property, is not a legitimate revocable license; is in fact (or, if valid, would be) irrevocable as conveying a usufructuary interest. 38, 49, *January, 1890*; 56, 366, *November, 1892*. So, a so-called revocable license to reside upon and cultivate certain land of the United States at a fixed rental named, *held* really a lease at will, conveying a usufructuary interest and not legal in the absence of authority from Congress. 54, 212, *June, 1892*.

**1601.** A license to go upon land of the United States will not authorize the licensee to take public property therefrom. *Held* that the Secretary of War was not empowered to grant a revocable license allowing the licensee to gather the fruit from trees growing upon

<sup>1</sup> Angell on Watercourses, 457.

<sup>2</sup> A license confers "no interest whatever in the land itself." 16 Opins. At. Gen., 212. See also 19 *id.*, 626.

government land: such fruit being public property disposable only by Congress. 58, 134, *October, 1892*.

1602. The Secretary of War is not empowered to grant a revocable license to use, any more than to lease, premises not belonging to the United States or under his control. 60, 350, *July, 1893*. Thus where the United States did not own certain land upon which had been erected, under appropriation by Congress, certain structures for the improvement of navigation, as cribs and pile work—*held* that as it had no interest in the soil but only a right of conservation of such structures, it could not, through the Secretary of War, grant a revocable license to use the land for any purpose which would interfere with the owner's rights, without his concurrence. 40, 42, 232, *March and April, 1890*.

1603. Where, under an appropriation for the improvement of the Hudson River, there had been constructed a dyke connecting the shore with an island—the United States having no property in the soil covered by the dyke, but only a right of maintenance and conservation of the work—*held* that a revocable license to build a dock across a part of the dyke could legally be granted to a party owning the land on which the dock was to be built; it fully appearing that such structure would not cause any injury to the dyke or interfere with the rights of any other person or with the navigation of the river. 41, 609, *March, 1887*.

1604. Congress has no power to grant or to provide for granting a license to establish and operate a ferry across navigable waters of the United States at a point within a State, or to prohibit the operation of a ferry at such point. This is a matter which comes within the police power of a State, and it has uniformly been held by the courts that the States did not surrender that power by the adoption of the Constitution or otherwise. But the Secretary of War may give a revocable license for the landing of a ferry (duly licensed by the proper local authority) at a pier of the United States, providing such landing may be made without injury to the pier and so as not to involve an exclusive use of any part of it. 58, 450, *March, 1893*.

1605. Upon an application by the City of Boston to the Secretary of War for a license to construct and maintain siphons for water pipes at Warren Bridge in the waters of Charles River, *held* that under the authority given him by the River and Harbor Act of 1888 to require the removal of obstructions to free navigation at bridges, the Secretary might properly grant such a license, as a form of assent to the construction as not likely to interfere with navigation. 29, 343, *January, 1889*.

1606. The City of Miles City, Montana, applied to the Secretary of War for permission to enter upon the Fort Keogh military reserva-

tion and make cuts for the purpose of straightening the channel of Tongue River, forming the boundary of the reservation, so as to prevent its encroaching upon the city. The proposed work would probably throw 175 acres of the reservation to the opposite side of the new channel, thus resulting in a permanent change and perhaps in permanent damage to the reservation. *Held* that the Secretary of War would not be empowered to grant a license in such a case, and that Congress alone could authorize the use of the land and operations designed. D, 3, *August, 1892*.

1607. A revocable license to go upon a military reservation and use the land for a purpose not affecting the interests or convenience of the military authorities, is an assurance to the person that he will not be molested as a trespasser while his license remains unrevoked. When revoked, he may be required to remove his property without unreasonable delay. 50, 420, *December, 1891*. Where certain cattle-men were permitted to erect a temporary fence on a military reservation and later the permission was withdrawn, *held* that they should be allowed to remove the materials. XLIX, 615, *December, 1885*.

1608. Licenses to enter upon and use lands of the United States have generally been guarded with such conditions as to prevent any permanent injury to government property. *Held* that a revocable license might be given to a farmer to use for irrigation the water flowing on a reservation and not needed for the purposes of the command, provided its use by him involved no material damage to the land or other public property. XLVI, 5, *January, 1882*; D, 3, *August, 1892*.

1609. Where the track of a railroad company was located upon a military reservation by license or sufferance, the company having no right of way granted it by Congress, *held* that the company could be ejected by judicial proceedings and its property moved off the reservation; but *advised* that a new location be designated, to better accommodate the requirements of the command, and that the company be given notice to move its tracks to the designated location, for the occupation of which a revocable license may be given it by the Secretary of War. 42, 324, *August, 1890*; Card 169, *August, 1894*.

1610. A license does not justify any use of the property other than as specified in the grant. It is therefore not assignable. LV, 603, *June, 1888*; Cards 639, *November, 1894*; 1155, *December, 1895*. And a transfer of it avoids the license. 42, 456, *September, 1890*. Thus *held* that an assignment to another, by the holder of a license to erect a hotel on the military reservation of Fort Monroe, was legally inoperative and an avoidance of the license. 44, 225, *December, 1890*.

1611. Revocable licenses (other than those instanced in the foregoing paragraphs) for the temporary use or occupation of the soil of a mili-

tary reservation have not unfrequently been granted under proper regulations by the Secretary of War.<sup>1</sup> As, for example, a license to occupy the land for target practice by a gun club (D, 91, *January, 1894*); for the landing of boats (A, 218, *March, 1887*; B, 343, *March, 1889*); for the landing of a submarine cable (A, 166, *December, 1886*; B, 172, *March, 1888*; 323, *February, 1889*); or for use as a bathing bench (C, 296, *June, 1891*); to occupy vacant buildings (B, 136, 198, *January and April, 1888*; C, 84, *January, 1889*; 173, *June, 1890*); or unused defences such as a Martello tower (B, 49, *July, 1887*; C, 427, *April, 1893*); to erect a temporary building for telephone office (A, 249, *May, 1887*; B, 231, *June, 1888*); for a store house (C, 123, 124, *April, 1890*); for refuge for fishermen (B, 354, *April, 1889*); for a church (B, 45, *June, 1887*; 416, *June, 1889*); for a schoolhouse (B, 45, *June, 1889*); for a keeper of a life-saving station (Card 817, *January, 1895*); to put up a stock yard or shipping pens for cattle to be transported by railway (A, 123, *July, 1886*); to carry a road across a part of the land as a convenient continuation of a town street (C, 6, *October, 1889*); to lay a track for a tramway or temporary railway (A, 99, *July, 1886*; B, 22, *June, 1887*; 355, *April, 1889*; C, 213, *October, 1890*; D, 131, *February, 1893*); to extend, maintain and operate an electric railway across a reservation (Card 1155, *April, 1895*); to

<sup>1</sup>Under date of Aug. 4, 1890 (19 Opins., 628), the Attorney General said

"It has been the practice for many years for the Secretary of War, and sometimes the President, \* \* \* to grant revocable licenses to individuals to enter upon military reservations and prosecute undertakings there which may be beneficial to the military branch of the public service as well as advantageous to the licensees.

"For many years a part of the tracks of the Baltimore and Ohio Railroad Company was laid by a revocable license on a part of the land at Harper's Ferry used by the United States for a manufactory of arms. Under a similar license a part of the land belonging to the fort at Old Point Comfort was allowed to be used as a site for a hotel, and in 1894 President Lincoln gave a license of this kind to a railroad company to use a part of the government land at Sandy Hook, and in 1899 another license was granted to said company to use part of the same land 'so long as it may be considered expedient and for the public interest by the Secretary of War, or other proper officer of the Government, in charge of the United States lands at Sandy Hook.' (See 16 Opins., 212.)

"In this case the license applied for [to construct an irrigating ditch] relates to a military reservation situated in an arid region, and therefore, in view of the advantage to Fort Selden of the use of this water, and in view of the frequent exercise of a similar power by granting such licenses as occasions have arisen through so many years, it seems clear that such license may be granted, the same to be under well considered restrictions and revocable at the will and pleasure of the Secretary of War."

The practice above referred to appears to have since obtained, except in the class of cases covered by the later opinions of the Attorney General of May 19, and July 7, 1897 (21 Opins., 537, 565). For a published list of the revocable licenses granted by the Secretary of War between Jan. 1, 1893, and Jan. 1, 1897, and of revocable leases granted during the same period under the act of July 28, 1892, see public document (not numbered), described as follows: "Granting permits for the occupancy or use of military reservations for non-military purposes (H. Res. 250, 54th Congress, second session, in the House of Representatives, Feb. 8, 1897)."

Permission to land ferries and to erect bridges on military reservations and to drive cattle, sheep, or other stock animals across the same is granted by the Secretary of War under sec. 6, of the act of Congress approved July 5, 1884.



a railway company to build spur tracks (Card 3221, *May, 1897*); to erect poles and carry a line of wire for telegraph or telephone communication (A, 173, *January, 1887*; C, 350, *October, 1891*; D, 77, *December, 1892*); to carry an electric wire across a government bridge (A, 198, 201, *March, 1887*; B, 132, *January, 1888*; C, 80, *February, 1890*); to lay underground pipes for water, oil, or gas (A, 106, 118, *July, 1886*; 211, *March, 1887*; B, 430, *June, 1889*; C, 481, *July, 1892*; D, 213, *June, 1893*); Cards 155, 316, *August and September, 1893*); to construct an irrigating ditch (A, 94, 169, *April and December, 1886*; B, 76, *August, 1887*; 475, *August, 1889*; C, 26, *November, 1889*; 376, *December, 1891*).

1612. If the United States acquires a military reservation subject to the public easement in a highway across the same and does not acquire exclusive jurisdiction over the reservation, the right to control and regulate the use of the public easement in such highway remains in the legislature of the State.<sup>1</sup> Where, in such a case, the reservation was in the State of New York, it was *held* that the consent of the State highway authorities and of the United States as owner of the fee to the highway within the limits of the reservation would be necessary to authorize the construction of an electric railway or an electric light line on such highway, the railway and line being under the laws of New York a burden on the fee additional to the easement for a highway. If the fee to the highway were owned by a private individual, the railway and line could be located thereon without his consent on payment of just compensation; but as the highway was on a reservation held by the United States for military purposes, there was no power in the State to authorize the appropriation of any part of such reservation without the consent of the United States. In the absence of statutory authority the Secretary of War could not give the consent of the United States so as to enlarge the easement to the highway, or rather so as to impose a new easement on the fee, but he could permit the railway and line to be located on the highway under a license which would impose no new easement on the fee and would be revocable by him at any time; such license to be issued preferably after the parties applying for the same had obtained the necessary consent from the proper highway authorities of the State. Cards 1240, 1545, *May and July, 1895*; 2143, *March, 1896*.

1613. Where a joint resolution of Congress authorized the Secretary of War to grant an army and navy contractor at Fort Monroe "permission to rebuild" at that post a store house "upon such conditions and under such restrictions as the Secretary of War shall deem compatible with the interests of the Government," it was *held* that the reso-

<sup>1</sup>See *Frank v. Pass Railway Co.*, 3 Phila., 164.

lution only authorized the Secretary of War to grant a license to build on and use lands of the United States and did not authorize him to grant an interest in the same. So the license thus granted not being assignable, *advised* that in lieu of the approval of a proposed transfer thereof a revocable license be issued to the transferee. Card 639, *November, 1894*.

1614. It is impracticable for Congress to provide by legislation for every case in which a license may be granted, because unforeseen necessities for permissions of various kinds, often needing immediate action, spring up, and these can only be met by an exercise of the power of the Executive. These permissions are not always granted by formal written licenses. They may not be reduced to writing at all, but may be entirely informal, oral permissions to do acts which would otherwise constitute trespasses. Such permissions are in effect and substance revocable licenses, just as much as those expressed in a written instrument. Indeed, the great mass of licenses to do acts of various kinds on military reservations are informal permissions of this character. Whether it be to enjoy some continuous privilege or to do a single act, makes no difference. All are in effect revocable licenses, emanating from the same authority. And the only advantage of the revocable license by written instrument is that it is the most convenient evidence of the permission. Many acts are, however, such that it would be absurd to resort to written instruments for the purpose of granting permission to do them. They are simply orally authorized or silently permitted, the authority being the authority of the President executed through the commanding officer of the post. At every large post there are, no doubt, a number of such acts done daily by the authority of these unwritten permissions, or unwritten revocable licenses. The power of the President probably does not extend to the granting of licenses for the doing of anything which would be an injury to the property, nor can he grant other than revocable permissions, but there appear to be no other restrictions. He can not grant licenses that are not revocable. The power is one to be exercised by the President at his discretion, subject only to the restrictions mentioned, and of course to such other restrictions as may be imposed by or be the result of acts of Congress. The act of July 28, 1892, authorizing the Secretary of War to grant leases, seems to have been intended as an extension, certainly not as a restriction, of his power. It is inapplicable to the purposes for which revocable licenses are used. And the 6th section of the act of July 5th, 1884, "to provide for the disposal of abandoned and useless military reservations," authorizing the Secretary of War to permit the extension of roads across military reservations, the landing of ferries

and the erection of bridges thereon, and to permit cattle to be driven across them, was apparently intended to confer power on him to grant more permanent privileges than revocable licenses give. A license is a bare authority to do a certain act or series of acts upon the land of the licensor without possessing or acquiring any estate therein. The Judge-Advocate General's Office has always held that the Secretary of War may, by revocable license permit a temporary use, terminable at his discretion, as the public interests may require, of United States lands under his control, provided such license conveys no usufructuary interest in the land, and such use does not conflict with the purpose for which the land is held. The word license, as applied to real property, imports an authority to do some act or series of acts upon the land of another. It passes no interest in the land itself and its only effect is to legalize an act which in the absence of the license would constitute a trespass. It may be created by parol, although a writing defining the exact nature and scope of the license is preferable.<sup>1</sup> In 1891, the Secretary of War decided that military reservations and lands occupied by the War Department are held and occupied for military purposes only, and that no licenses for their use or occupation would be given without authority from Congress, unless such use or occupation would be of some benefit to the military service. (Circ. 12, A. G. O., 1891.) It will be noticed that this is merely the announcement of a policy, and not the denial of the existence of the power. And, as a matter of fact, the policy thus declared was not carried out. In practice it is fully recognized that the Secretary of War may thus license any act which would not be an injury to the property nor conflict with the purpose for which it is held. This is giving a reasonable application to the rule against the granting of usufructuary interests or permission to commit waste. So far as the "sectarian purpose" for which a license may be required, is concerned, it is evident that such purpose does not affect the power to grant the license but the policy of granting it only. In the absence of action by Congress, the exercise of the power rests in the discretion of the President, and the purpose can be no restriction on his discretion, except in so far that it must not be incompatible with, that is, an interference with or an obstruction to, the general use for which the land is held. Card 2061, *February, 1897*.

1615. In an opinion dated May 19, 1897, the Attorney General held with reference to the license for the construction of a Roman Catholic chapel on the West Point reservation, that the Secretary of War had no authority to grant it. He also held in an opinion, dated July 7, 1897, that the Secretary of War had no authority to grant permission

<sup>1</sup>Rice on Real Property, p. 505

for the erection of a Bethel reading room and library within the military reservation on Ship Island, Miss.<sup>1</sup> By act of July 8, 1898 (30 Stat., 722), the Secretary of War was given authority to permit the erection of buildings for religious purposes on the West Point reservation, but no such authority has been given with reference to other military reservations. *Advised* that under the opinions of the Attorney General above cited, the Secretary of War was without authority to license the construction of a building for a Roman Catholic chapel on the Fort Hancock military reservation. Card 6960, *August, 1899*. Similarly *advised* with respect to an application for license to erect on the same reservation a building to be used exclusively for Union Protestant worship. Card 4974, *September, 1898*.

**1616.** *Held* that the Secretary of War is without authority to license the commission of waste upon military reservations, or under the act of July 28, 1892, to lease them for a purpose which would amount to waste; but the rule here stated has not been strictly observed in practice. Cards 2879, 2930, *February, 1897*; 3619, *November, 1897*; 4126, *May, 1898*; 7900, *April, 1900*.

#### LINE OF DUTY.

**1617.** The term employed in the Pension Laws—"in the line of duty" is much more comprehensive than the term "on duty", as used in the 38th Article of War. Its application is not limited to a status of actual present performance of some specific military duty, but it relates to a condition under which military duty may be regularly performed in contradistinction to a condition inconsistent with the performance of any ordinary duty—such as the condition of being on leave of absence or of being retired. These laws being beneficial in their character, the term is to be construed so as to advance the benefit rather than to restrict it.<sup>2</sup> LI, 347, *June, 1887*. A soldier is not necessarily out of the line of duty when he is in confinement for a military offence, since it is a part of his military duty to submit to such punishment. If pending such confinement he receives an injury which was in fact a casualty of the service not incurred by his own fault or negligence, his claim for pension should not be prejudiced by the fact that he was in confinement under sentence of a court martial when the injury was received. XII, 257, *June, 1878*.

**1618.** But the being "in the line of duty" is not inferable merely from the being *in the service*, but is an independent fact to be affirmatively proved. Thus where a soldier was killed by the accidental dis-

<sup>2</sup> 21 Opins. At. Gen., 537, 565.

<sup>1</sup> See 1 Opins. At. Gen., 182, 7 *id.*, 161.



charge of a carbine in the hands of another soldier with whom he was at the time engaged in rough play or scuffling, the soldier killed being armed with a stone, *held* that the killing was not in the line of duty. To be in the line of duty it is not necessary that the soldier should, at the time of the injury, be engaged in the execution of a specific act of military duty, but he must not be doing something quite unconnected with duty and inconsistent with his proper military function. 61, 188, *August, 1893.*

1619. Similarly *held* in regard to a soldier who was shot and physically injured in barracks by the accidental discharge of a pistol, the personal property of a fellow-soldier, who was, at the time, manipulating and exhibiting the same with a view of making a sale of it to the other, in violation in fact of a post general order forbidding the use or production of arms other than those furnished by the Government. The injury in this case was not caused or incurred while in the legitimate performance of a military duty or service, or as a result, direct or indirect, of any such performance. It was connected in no manner with duty or service or with the military relation of the parties, but grew out of a purely private and personal transaction. 58, 10, *February, 1893.*

1620. It has uniformly been ruled, in the administration of the Pension Laws, that a soldier absent from his command on *sick furlough* remained "in the line of duty." So, in the case of a volunteer soldier who had been given a sick furlough for twenty days, and was disabled by the kick of a horse so that he could not return, *held* that if the disability was incurred before the expiration of his furlough, he was then "in the line of duty" within the meaning of the act of March 2, 1889, providing for the removal of the charge of desertion in certain cases, and the charge of desertion against him should be noted as erroneous. 44, 462, *January, 1891.*

1621. Sec. 4700, Rev. Sts., puts enlisted men "on veteran furlough with the organization to which they belong" upon the same footing as men on sick furlough. So, *held* that a volunteer soldier furloughed with the rest of the organization to which he belonged might also properly be considered as "in the line of duty", while absent from his command on such furlough, within the meaning of the act of March 2, 1889. 47, 448, *June, 1891.*

1622. In a circular, dated May 11, 1893, from the Surgeon General's Office, the following rule, approved by the Secretary of War, is laid down: "It is just to assume that all diseases contracted or injuries received while an officer or soldier is in the military service of the United States occur in the line of duty unless the surgeon knows first that the disease or injury existed before entering the service; second,

that it was contracted while absent from duty on furlough or otherwise; or, third, that it occurred in consequence of willful neglect or immoral conduct of the sick man himself." There appears, however, to have been no rule laid down by the War Department with reference to injuries received through carelessness. In a case decided by the Assistant Secretary of the Interior on July 24, 1890, it was held that gross carelessness by the soldier in handling his gun rendered his title to pension for an injury resulting from such carelessness questionable on the ground of contributory negligence. In another case, decided April 11, 1891, the same authority held that a pistol shot wound, caused by the accidental discharge of the weapon while the soldier was engaged in cleaning the same for use in the performance of special service as a teamster in the Quartermaster's Department, being unattended by contributory negligence, was in the line of duty for pensionable purposes. The rule with respect to contributory negligence cannot however be applied in all its strictness in determining the question whether a soldier's injuries have been received in the line of duty, but it is safe to say that injuries are not so received when caused by the soldier's gross carelessness. Beyond this it is not safe to attempt to lay down any rule, but best to leave each case to be determined upon its own facts. Thus where a soldier, while in barracks preparing to clean his carbine, accidentally discharged it, inflicting a wound upon himself, it appearing that he had just previously on the target range fired a number of shots and had in some way left a cartridge in the piece, that he had had, prior to his entry into the service a short time before, no experience in the handling of firearms and that the particular arm was a new model of carbine recently issued; *held* that the facts did not fix upon the soldier that degree of carelessness which would require it to be held that he was not in the line of duty when the injury was received. Card 2474, August, 1896.

1823. The Interior Department ordinarily decides for itself whether, for pension purposes, a death or disability was incurred in the line of duty; but the War Department must also decide for itself the meaning of the phrase when applied to facts requiring its action, and in some instances different constructions by the two departments have resulted. Formerly the expression "line of duty" was more strictly construed than latterly,<sup>1</sup> but the earlier construction has not been adopted in practice. By section 4 of the act of March 3, 1865 (13 Stat., 488), it was provided, "that every non-commissioned officer, private, or other person, who has been or shall hereafter be discharged from the army of the United States by reason of wounds received in battle, or skirmish,

<sup>1</sup> 1 Opin. At. Gen., 182; 7 *id.*, 161, 162.

on picket, or in action, or in the line of duty shall be entitled to receive the same bounty as if he had served out his full term." And by an act approved April 12, 1866, it was declared, "that the true intent and meaning of the words 'or in the line of duty', used in the fourth section of the act approved March 3, 1865, \* \* \* requires that the benefit of the provision of said section shall be extended to any enlisted man or other person entitled by law to bounty who has been or may be discharged by reason of a wound received while actually in service under military orders, not at the time on furlough or leave of absence, nor engaged in any unlawful or unauthorized act or pursuit." For the purpose of the earlier legislation, this legislative construction is conclusive, but it is not necessarily so in determining the soldier's condition or military status in other cases; for example, as to his right of admission to the Soldiers Home. A further limitation has been in practice recognized, viz., that the disability must not be the result of the unlawful or unauthorized act as a direct or contributory cause.<sup>1</sup> The principle as stated in the act of April 12, 1866, modified by the limitation just stated, is as accurate a general statement of the meaning in military administration of the expression "in the line of duty" as can be given. It is, however, subject to exceptions. Thus, a soldier may be on furlough, yet in the line of duty, as when en route to his station or when during his furlough he is, in compliance with orders, on his way to a place to report his whereabouts. So, certain acts may in a measure be contributory causes of disability and yet not to such a degree as to bring the case within the general rule, as when the disability is the result of negligence but the negligence is not of such a degree as to amount to culpable contributory negligence. So, a soldier in confinement or arrest is, in a restricted sense, not in the line of that kind of military duty for which he was enlisted, but in a general military sense he is in the line of duty, or rather he is not taken out of the line of duty by the fact of his confinement. A disability incurred while in military confinement or arrest is "in the line of duty," or not, according to the facts of the case. Thus, a military prisoner incurring a disability while aiding the guard in suppressing a mutiny incurs his disability in the line of duty; if he incurs it while engaging in the mutiny it would not be in the line of duty. If the disability is incurred while at work as a prisoner, it would be in the line of duty; and so too if the disability were simply the result of the confinement (for example, rheumatism contracted in confinement), and this notwithstanding that the confinement is the direct consequence of the soldier's unlawful act. Applying these principles to the case of a

<sup>1</sup> See Circular, approved by the Secretary of War, from the Surgeon General's Office, dated May 11, 1893, quoted in preceding section.

soldier who rejoined the army from absence in desertion, and subsequently while en route to his station on board a government transport was killed by the explosion of the boilers, it was *held* that his death occurred in the line of duty. Card 2658, *October, 1896*.

1624. A soldier while awaiting sentence of a general court martial was chopping wood under charge of the guard, when by accident he inflicted a wound with the axe upon his left foot necessitating partial amputation thereof. On the day following the accident the order promulgating his sentence of dishonorable discharge was received at the post and thereupon executed. Subsequent to his discharge he applied for commutation under the laws relating to artificial limbs (Secs. 4787-4791, Rev. Sts., and the acts of August 15, 1876, and March 3, 1891). *Held* that he was still in the service when the accident occurred (see § 1153, *ante*); and further that he was in the line of duty at the time within the meaning of the statutes cited. Card 3063, *April, 1897*.

1625. By the established practice of the War Department a soldier on "pass" is held not to be taken out of the line of duty by that fact, and this it would appear includes the hunting pass. The fact that hunting is encouraged (par. 363 A. R.) is a very good reason for holding that, in doing what he is encouraged to do, the soldier is not thereby taken out of the line of duty. It is so held by the Board of Commissioners of the Soldiers Home.<sup>1</sup> Card 3069, *April, 1897*.

#### LOSS OF RANK OR FILES.

1626. Loss of, or reduction in, files or steps (*i. e.* relative rank), in the list of the officers of his grade, is a recognized legal punishment by sentence of court-martial, in a case of a commissioned officer. Like disqualification, it belongs to the class of *continuing* punishments.<sup>2</sup>

<sup>1</sup> But the Interior Department has its own rulings as to what constitutes line of duty for pension purposes, and in the case of James E. Harrison, held, under date of December 22, 1893, that the claimant, having received permission to hunt for his own recreation, and while hunting having been shot in the hand by an accidental discharge of his gun, was not injured in the line of duty. 7 Dec. Interior Dept. See also Report of the Assistant Secretary of the Interior, 1896. (H. R. Doc. 5, p. 74, 2d session 54th Cong.)

<sup>2</sup> See 12 Opins. At Gen. 547.

The effect of this punishment is to deprive the officer of such relative right of promotion, as well as right of command, and of precedence on courts or boards and in selecting quarters, &c. as he would have had, had he remained at his original number. Such effect continues unless the sentence, pending its execution, is remitted.

This punishment has sometimes been remarked upon as an objectionable one, apparently mainly on account of the inequality of its effect upon other officers of the grade of the officer sentenced. Thus, where an officer is reduced a certain number of files, those below whom he is placed are advanced while those below himself gain nothing. See G. C. M. O. 25, War Dept. 1873; do 2, Dept. of Dakota, 1873. Where he is reduced to the foot of the list, this objection does not apply; this form of the punishment, however, where the list is a long one, is extreme and severe, more severe, often, than suspension for a fixed term.



XXI, 382, *May, 1866*; LI, 677, *March, 1887*; 41, 380, *July, 1879*; 58, 434, *December, 1892*.

1627. Where a court martial convened by a department commander for the trial of an officer sentences the accused, upon conviction, to the punishment of a loss of files or steps in the list of officers of his rank, the approval of the commander is sufficient to give full effect to the sentence, and no action by superior authority can add anything to its effect or conclusiveness. The code does not, as in the case of a sentence of dismissal, render a confirmation by the President essential to the execution of such a punishment; and the fact that the same involves a change in the Army Register does not make requisite or proper a revision of the case at the War Department. All that is called for, upon the approval of such a sentence by the commander, is simply to notify the Secretary of War thereof by forwarding a copy of the order promulgating such approval. The proceedings (or their substance), as affecting officers other than the accused, may then well be republished in orders from the Adjutant General's Office. XXXVI, 134, *December, 1874*; XXXVII, 83, *October, 1875*; XLIII, 286, *April, 1880*.

1628. A second lieutenant was sentenced "to retain his present number on the lineal list of second lieutenants for three years". *Held* that this sentence necessarily deprived him of all right to promotion so long as it continued in force. Lieutenants junior to him may be advanced without any regard to him and precisely as if he were not on the list at all. The promotion of an officer in such a status would have the effect of a pardon. 47, 293, *May, 1891*.

1629. A lieutenant was sentenced—"to be reduced two files in regimental rank". As the regimental rank of a line officer is the basis of his rank in his arm and in the army at large, *held* that his reduction on the regimental list involved a corresponding reduction on the lists of lineal and relative rank. LV, 626, *June, 1888*.

1630. An officer, as the result of two successive trials by court-martial, stood sentenced to be reduced to the foot of the list of lieutenant-colonels of cavalry and to remain there without advancement for two years. *Held* that his status was equivalent to that of an officer sentenced to *lose files* for two years, and that his sentence was a continuing punishment, subject to be discontinued by pardon. LI, 677, *March, 1887*. And further *held* that such a sentence was a legal one, and that as the officer had no rank in the army independent of his rank in the cavalry arm, the former rank being incidental to and measured by the latter, his relative army rank was necessarily affected by the sentence in the same manner as his lineal rank. 29, 487, *January, 1889*.

1631. A sentence of a first lieutenant "to be reduced in rank so

that his name shall appear in the Army Register next below the name of "a certain other first lieutenant of his regiment, *held* not a punishment executed upon approval, so as to be beyond remission, but, like a sentence to lose files, a continuing punishment removable by pardon." 56, 434, *December, 1892.*

1632. In 1874 an officer, then a first lieutenant, was sentenced "to be reduced in rank so that his name should thereafter be borne on the rolls of the army next after that of "a certain other first lieutenant of the same regiment. This officer was promoted to a captaincy, May 10, 1888, and the officer under sentence was similarly promoted, August 20, 1889. Upon an application by the latter (in 1890) to have his sentence remitted, *held* that, by the operation of the first of these promotions, the sentence was rendered irrevocable. A remission or pardon would not at this time restore the officer to the position he occupied prior to the sentence, nor divest the rights of others acquired by promotion during the pendency of his reduction. The sentence had indeed been fully executed and was therefore beyond the reach of the pardoning power. 41, 380, *July, 1890.*

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## M.

### MANSLAUGHTER.

1633. That this crime, when its commission by an officer or soldier affects the discipline of the service, may be taken cognizance of by a court martial, in time of peace, under Art. 62, as "conduct to the prejudice of good order and military discipline," see SIXTY-SECOND ARTICLE. In time of *war* it is made so cognizable, when committed by an officer or soldier under any circumstances, by Art. 58.

1634. A party of soldiers left their camp at night *in time of war* without leave and contrary to positive orders, and proceeded to a neighboring town where they created a disturbance. Their commanding officer followed them, found them at an ale-house, and was about to arrest them when they broke from him, and, though knowing who he was, disregarded his order to halt and continued to run. He repeated his order, and not being obeyed, and having no other means of detaining them, fired upon them while fleeing, with his pistol, and shot and killed one of them. Having been brought to trial by court martial under a charge of murder, he was convicted of manslaughter, and sentenced to dismissal, forfeiture of pay, fine and imprisonment.

<sup>1</sup> 12 Opins. At. Gen., 547; 17 *id.*, 17, 656.

*Held*, in view of all the circumstances of the case, that the finding and sentence would properly be disapproved.<sup>1</sup> XI, 592, *March, 1865*.

1635. Where, *in time of peace*, a soldier while running toward his quarters from two officers of the command, who were attempting to arrest him for disorderly conduct at night, was, by the order of the superior officer, fired at by the inferior and mortally wounded; and it was doubtful upon the evidence whether a sufficient effort had been made to halt the soldier before firing, while at the same time it appeared quite probable that he might subsequently have been identified at the post and duly punished;—*held* that, whatever may have been the offence, if any, of the junior officer, the superior, who directed the firing, might, upon the death of the soldier from his wound, properly be brought to trial on a charge of "manslaughter to the prejudice of good order and military discipline." XXV, 592, *June, 1868*.

1636. Where a soldier confined with other prisoners in a guard house, in time of peace, was under the influence of liquor and noisy, and continued to be noisy and disorderly though repeatedly ordered by the officer of the day to keep quiet, and was finally struck or thrust in the breast by the latter with his sword and mortally wounded so that he presently died; and it did not appear that there was any danger of mutiny or serious disturbance on the part of the other prisoners present at the time;—*held* that the evidence established no sufficient justification for a resort by the officer to such an extreme proceeding, and that his conviction by court martial of "manslaughter to the prejudice of good order and military discipline," and sentence of dismissal, were warranted and proper. An officer has no right to take the life of a soldier, nor to commit a battery upon him with a dangerous weapon, except in a most aggravated case: as in a case of riot, rescue or mutiny, violent resistance to superior authority, escape, or refusal to obey a lawful order requiring instant obedience—when no other but such extreme means will restrain or compel compliance.<sup>2</sup> And an act of killing of a soldier, which in time of war might be justifiable homicide, might be manslaughter, or even murder (see MURDER) in time of peace. XXXVIII, 579, *April, 1877*.

#### MARRIAGE.

1637. In the absence of express authority given by a statute of the State or Territory, an officer of the army cannot be empowered to

<sup>1</sup> Disapproved accordingly in G. C. M. O. 177, War Department, 1865. Compare the case of a killing by a deputy U. S. marshal under similar circumstances, referred to by the Attorney General in 14 Opns., 71.

<sup>2</sup> See remarks of Secretary of War in G. C. M. O. 47, Hdqrs. of Army, 1877; and compare *United States v. Carr, & Woods*, 484; also orders cited in note to § 2322, *post*.

solemnize marriage, whether the male party be a soldier or a civilian. XXIX, 674, *February, 1870*; Card 3501, *September, 1897*.

1638. A military commander, authorized to grant or refuse passes or furloughs to his command, may of course refuse permission to leave the post to a soldier whose purpose is to become married. A commander may also, if the interests of discipline require it, exclude the wives of soldiers (who are not laundresses) from a post under his command at which their husbands are serving. But while the Army Regulations forbid the enlisting (in time of peace, without special authority) of married men, there is no statute or regulation forbidding the contracting of marriage by soldiers, any more than by officers, while in the service. So *held* that, under existing law, a military commander could have no authority to prohibit soldiers, while under his command, from marrying; and that the contracting of marriage by a soldier (although his commander had forbidden him, or refused him permission, to marry) could not properly be held to constitute a military offence. Where indeed there is involved in the conduct of the soldier at the time any military neglect of duty or disorder, he may, for this indeed, be brought to trial, but not for the marrying as such. And *remarked*, that if the marrying by soldiers after enlistment becomes so generally practiced as to be demoralizing to the army or otherwise prejudicial to discipline, the evil can effectually be repressed only through new legislation by Congress. XXXVIII, 47, *April, 1876*; 407, *January, 1877*; XLIII, 109, *December, 1879*.

#### MARTIAL LAW.

1639. Martial law is a modified degree of the law of war (see § 1567, *ante*), or a law assimilated to the latter, called into exercise temporarily and for a specific purpose, at a time of war or public emergency, and generally in a place or region not constituting enemy's country, or under permanent military government.<sup>1</sup> Whether proclaimed by the President or declared by a competent military commander, martial law overrides and supersedes, for the time being, all civil law and authority, except in so far as the same may be left operative by the terms of the announcement,<sup>2</sup> or the action or acquiescence

<sup>1</sup> Note the distinction between *military government* proper and *martial law* as illustrated in *Milligan's Case*, 4 Wallace, 142. The "martial law" referred to in the text is defined in the *Manual for Courts Mar.* (1901), p. 5, as "Martial Law at Home (or, as a domestic fact); by which is meant military power exercised in time of war, insurrection or rebellion, in parts of the country retaining their allegiance, and over persons and things not ordinarily subject to it."

<sup>2</sup> *Luther v. Borden*, 7 Howard, 13-14; *United States v. Dickelman*, 2 Otto, 526; *In re Egan*, 5 Blatch, 319, 321; *Griffin v. Wilcox*, 21 Ind. 376; *Johnson v. Jones*, 44 Ills. 153; *In re Kemp*, 16 Wise 382; *Clode* (Military and Martial Law), 183-191; *Hough* (Precedents), §14, 549; G. O. 100, War Dept., 1893, Sec. 1.



of the dominant power. While the status of martial law continues, the military power, instead of being subordinate, is superior to the civil power, and the natural and normal condition of things is thus reversed. But while martial law will warrant a resort by the commander, at his will, to summary and arbitrary measures, by which the liberty of the citizen may be restrained, his action coerced, and his rights suspended, it cannot be availed of by subordinates to justify acts of unnecessary violence, personal persecution, or wanton wrong.<sup>1</sup> XII, 105, *December, 1864*; XIX, 41, *October, 1865*; Card 8383, *May, 1900*.

1640. Where a city or district has been put under martial law by the commanding general, he becomes its supreme governor, and, in governing, is ordinarily to be presumed to be empowered to exercise the same authority which the President might have exercised had he proclaimed martial law therein.<sup>2</sup> X, 669, *December, 1864*.

1641. In view of the President's proclamation of July 5, 1864, suspending the writ of *habeas corpus*, and establishing martial law in the State of Kentucky, *held* (December, 1864), to be competent for the general commanding the military district of Kentucky, if in his judgment the effective maintenance of martial law and the accomplishment of the ends proposed by its declaration required it, to restrain, by such means as in his discretion might be deemed needful, the prosecution of suits instituted against United States officers for acts done in the line of their duty, and having the effect (indicated in the proclamation) of impeding "military operations," and of embarrassing "the constituted authorities of the Government of the United States." X, 669, *December, 1864*.

1642. The occasion for the exercise of martial law properly ceases when the emergency has passed which made it necessary or expedient.<sup>3</sup> So, the commander of the Middle Military Department having, in view of the presence in the department of an army of the enemy, proclaimed, by order of June 20, 1863, a state of martial law in Baltimore city and county and the counties of the western shore of Maryland, with the assurance expressed that such status should not extend beyond

<sup>1</sup> "But the existence of martial law does not authorize general military license, or place the lives, liberty, or property of the citizens of the States under the unlimited control of every holder of a military commission." *Deppan v. Olney*, 1 Curtis, 308. And see *Luther v. Borden*, 7 Howard, 14; G. O. 100, War Department, 1863. See, 1, par. numbered 4.

<sup>2</sup> In *Clark v. Dick*, 1 Dillon, 8, the court, referring to the placing of the city of St. Louis under martial law by the Department Commander, Maj. Gen. Halleck (by G. O. 34, Dept. of the Missouri, 1861), observes: "That this officer represented the President who is commander-in-chief of the army and was vested with all the authority as such military commander that belonged to the President, cannot be doubted."

<sup>3</sup> In *re Egan*, 5 Blach. 319, 322; In the matter of Martin, 45 Barb. 145; Hough (Precedents), 535.

the necessities of the occasion,—*held* that as the exigency had long ceased to exist, the order, though never in terms revoked, should properly be considered as no longer operative. XII, 422, *June, 1865*.

1643. The President's proclamation of Sept. 24, 1862, subjected to martial law and trial by military courts throughout the United States certain classes of persons named, and suspended the privilege of the writ of *habeas corpus* as to all persons imprisoned under military sentence or by military authority "during the rebellion." The further executive proclamation of Sept. 15, 1863 (issued pursuant to the act of March 3, 1863,—see § 1436, *ante*), suspended the privilege of the writ throughout the United States as to certain classes of persons enumerated. The further proclamation of Dec. 1, 1865, in revoking generally the suspension declared by the proclamation of Sept. 15, 1863, excepted from such revocation, and left the suspension in force in, certain States and Territories specified and "in the District of Columbia." The proclamation of April 2, 1866 (which, in one of its preambles, declared that martial law and the suspension of the writ of *habeas corpus* were "dangerous to public liberty, incompatible with the individual rights of the citizen," &c., and "ought not to be sanctioned or allowed except in cases of actual necessity," &c.), announced the rebellion as at an end throughout the United States, the State of Texas only excepted. *Held*, in view of these proclamations, that, so far as concerned the exercise of military authority and jurisdiction, martial law might be considered to have existed in the District of Columbia, from Sept. 24, 1862, as to the classes of persons indicated in the proclamation of that date, and from Sept. 15, 1863, as to other classes of persons indicated in the proclamation of that date, to April 2, 1866, the date of the proclamation issued at the end of the war.<sup>1</sup> XXXV, 177, *February, 1874*.

1644. Martial law is defined as military authority exercised in accordance with the rules and usages of war;<sup>2</sup> and "Martial Law at Home" (or, as a domestic fact) as military power exercised in time of war, insurrection or rebellion, in parts of the country retaining their allegiance, and over persons and things not ordinarily subject to it.<sup>3</sup> Martial law as a domestic fact presupposes a condition in which the civil courts are unable to enforce their processes, and is justified by the necessity of society's protecting itself by suppressing the resistance, so as to enable the civil courts to fulfill their proper functions.

<sup>1</sup> "It would seem to be conceded that the power to suspend this writ" (the writ of *habeas corpus*) "and that of proclaiming martial law, include one another. . . . The right to exercise one power implies the right to exercise the other." 9 Am. Law Reg. 507-8. And see *Ex parte Field*, 5 Blatch. 82.

<sup>2</sup> Instructions for the Armies of the United States in the Field, G. O. 100, A. G. O., 1863.

<sup>3</sup> Manual for Courts Martial (1901), I, 5.

It is the suspension of all law but the will of the military commanders entrusted with its execution, to be exercised according to their judgment, the exigencies of the moment and the usages of the service, with no fixed or settled rules of law, no definite practice, and not bound by even the rules of the military law.<sup>1</sup> When martial law prevails the civil power is superseded by the military power, and the ordinary safeguards to individual rights are for the time being set aside,<sup>2</sup> but it is incumbent on those who administer it to act in accordance with the principles of justice, honor and humanity and the laws and usages of war.<sup>3</sup> Card 8383, *May, 1900*.

1645. A proclamation declaring that a "state of insurrection and rebellion" exists in a particular region of a state is in effect a declaration of martial law, but such declaration is not essential. Martial law as a domestic fact exists when, the resistance to law having reached such a stage that the civil authorities are powerless to cope with it, the military take control to suppress the resistance and restore the civil authority. Such martial law ceases when the necessity for it ceases. It ceases when the civil authorities resume their unobstructed functions, although the military may be present to aid them if the need of such aid should arise. Card 8383, *supra*.

1646. When the United States is called upon to protect a State against "domestic violence," its military forces act in aid of the State authorities to the extent necessary to re-establish the civil authority; they are not however under the command of the State authorities, but of their military officers under the President. To this extent they are an independent force, operating under the orders of the President, to perform a duty to the State imposed upon the United States by the Constitution.<sup>4</sup> Card 8383, *supra*.

#### MAXIMUM PUNISHMENT.<sup>5</sup>

1647. In a case where, because of previous convictions, the punishment may, under G. O. 21 of 1891, be dishonorable discharge, the department commander may properly require the charges to be brought

<sup>1</sup> Ponieroy's Constitutional Law, § 712; Finkson on Martial Law, p. 107.

<sup>2</sup> See Lieber's Use of the Army in Aid of the Civil Power, p. 786, *post*.

<sup>3</sup> As to the rights, duties and obligations of a military commander who is directed to suppress an insurrection in a State, see Birkhimer's Military Government and Martial Law, pp. 395-399.

<sup>4</sup> See Report No. 1939, House of Representatives, 56th Congress, 1st session (Cœur d'Alene Labor Troubles).

<sup>5</sup> "Whenever by any of the articles of war, \* \* \* the punishment on conviction of any military offence is left to the discretion of the court-martial, the punishment therefor shall not in time of peace be in excess of a limit which the President may prescribe." Act of Sept. 27, 1890.

Under this act executive orders prescribing maximum punishments have been issued. See General Orders 21 A. G. O., 1891, do. 16 of 1895, do. 16 of 1898, do. 88 of 1900; do. 42 of 1901.

to trial before a general court martial, notwithstanding that, if the alternative punishment of dishonorable discharge be not resorted to, the punishment would be within the power of an inferior court. 60, 378, *July, 1893*.

1648. An offence covered by G. O. 21 of 1891 is cognizable by inferior court martial whenever the limit prescribed in the order may, by substitution of punishment under the provisions of the order, be brought within the punishing power of inferior courts as defined by the 83d Art. of War. 60, 484, *July, 1893*.

1649. The term "day" or "days", when used in G. O. 21 of 1891, has reference to a day of twenty-four hours. 53, 149, *April, 1892*.

1650. A sentence of a summary court forfeited one month's pay in a case where, under G. O. 21 of 1891, the maximum legal forfeiture was ten dollars. *Held* that the sentence was void as to the forfeiture in excess of the limit, and *advised* that the amount collected in excess of such limit be refunded to the soldier. 55, 218, *August, 1892*.

1651. It is now held by the War Department that when a sentence of confinement or forfeiture exceeds the prescribed limit, the part within the limit is legal and may be approved and carried into execution.<sup>1</sup> 55, 349, *September, 1892*.

1652. The term "authorized confinement" as used in Article IV, of G. O. 16, of 1895 (now Art. IV, G. O. 42 of 1901) is not limited to the maximum authorized. Confinement for a period less than the maximum is also authorized confinement. The article means that when the maximum term may be more than six months, dishonorable discharge with forfeiture of pay and allowances may be awarded with whatever confinement, within the prescribed limit, the court may adjudge. Card 1551, *July, 1895*. *Held* also that such "authorized confinement" is limited to the specific confinement authorized by Article II, or if not provided for therein, by the custom of the service; that is to say, such confinement may not be increased by substitution of confinement for forfeiture, or on account of previous convictions, the same not being provided for by the terms of Article IV. Card 8543, *July, 1900*.

1653. By the third subdivision of Art. III of the Executive order of March 30, 1898 (G. O. 16 A. G. O., 1898), it is provided that in consideration of previous convictions the limit of punishment shall be "dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three months." Such a sentence means, so far as the forfeiture is concerned, forfeiture of pay and allowances due at the date of the discharge. A court martial when it has the power to award this sentence may award a lesser one, but in doing so

<sup>1</sup>See par. 2, Circ. 12, A. G. O. 1892.



cannot award confinement and forfeiture greater in amount than confinement for three months and forfeiture of pay and allowances due, or its equivalent under the rule of substitution authorized in the order.<sup>1</sup> Card 3694, *April, 1898*. See Cards 2381, *June, 1896*; 2751, *November, 1896*.

1654. The order prescribing maximum punishments also provides for certain substitutions of punishment. The purpose of these provisions is not only to determine the measure but also the kind of punishment, which should be considered authorized, so far as the offences specified in the order are concerned. Thus where the prescribed limit is forfeiture and confinement, a reprimand in lieu thereof cannot legally be adjudged. Card 436, *October, 1894*.

#### MEDAL OF HONOR.

1655. The original enactments of 1862 and 1863, providing for the award of medals of honor, and appropriating moneys for the expenses of the same, evidently contemplated a personal presentation to the selected recipient. Such is also inferably the design of the present Army Regulations, wherein (Art. XXVI) the medal of honor is assimilated to the certificate of merit, each being manifestly intended to honor and distinguish the recipient *in person*. *Held* therefore that (except by special authority of Congress) a medal of honor could not legally be awarded to the widow, or a member of the family, of a deceased officer, on account of distinguished service in action performed by the latter during his lifetime. 49, 55, *September, 1891*; 52, 30, *March, 1892*.

1656. Par. 175, A. R. (177 of 1895), like the provision, upon which it is based, of the act of March 3, 1863, is deemed to contemplate, in a case of an award to an officer, that the person shall be a commissioned officer of the army at the time of the award. A contract or acting assistant surgeon is not, and was not at any time, such a commissioned officer. *Held* therefore that a medal of honor could not legally be awarded to a person for alleged distinguished service rendered while serving in the field as an acting assistant surgeon in 1864, who moreover had had no connection with the army since 1865.<sup>2</sup> 52, 404, *March, 1892*; 53, 187, *April, 1892*; Card 1128, *March, 1895*.

1657. On July 12, 1862, a resolution was passed providing that the

<sup>1</sup>Since the rendition of this opinion, the Executive order referred to has been amended by adding thereto the following (G. O. 88, A. G. O. 1900): "Article IX. If, in cases where the limit of punishment is dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for a stated number of months, dishonorable discharge be not adjudged, the limit of forfeiture shall be all pay due and to become due during the prescribed limit of confinement." See Art. V of Executive order, published in G. O. 42, A. G. O., 1901 (Court-Mar. Manual, 1901, p. 56).

<sup>2</sup>See opinion in this case of the Attorney General in 20 Opins., 421.

President cause two thousand medals of honor to be prepared with suitable emblematic devices, and direct the same to be presented, in the name of Congress, to such non-commissioned officers and privates as should most distinguish themselves by their gallantry in action and other soldier-like qualities, "during the present insurrection", and ten thousand dollars was appropriated to pay the cost of the same. Nearly a year afterwards, on March 3, 1863, and while "the insurrection" was still in progress a section in a sundry civil bill then enacted, provided that the President should cause to be struck from the dies prepared for and used to make the two thousand medals of honor, "medals of honor additional to those;" and that he should present the same to such officers, non-commissioned officers, and privates, as have distinguished or who may hereafter most distinguish themselves in action; and twenty thousand dollars was appropriated to pay the cost of the same. The second act must necessarily be held to provide for the same kind of medals as those provided for in the first; for it provides for them to be struck from the same dies. They were to be given to the same class of persons—non-commissioned officers and privates—and also officers. The first act provided for them to be presented by the President in the name of Congress; the second provided that the President should present them, without expressly providing that they should be presented in the name of Congress. The first expressly provided that the gallantry or other soldier-like conduct, on account of which the medals were given, should be displayed in the then existing "insurrection". The other provided that they should be given on account of gallantry theretofore or thereafter displayed. It has not heretofore been held that the gallantry should be confined to actions in the war of the rebellion. The practice has been in accordance with this view; and as the literal meaning of the language of the later act sustains it, the practice should not be changed. Card 4159, *May, 1898.*

#### MEDICAL OFFICER.

1658. The medical officer of a command is responsible (within reasonable limits) for the health of the men composing it. Where, in the course of the proper and regular performance of his function he excuses men from duty on account of sickness or disability, the commanding officer should almost as a matter of course accept his action as conclusive and final. If he refuses to do so and orders on duty a soldier thus excused, he assumes the responsibility of any material injury that may thus result to the individual or the service; and if injury results in fact, is amenable to trial for the military offence involved. XLIII, 250, *March, 1880.*

**1659.** A medical officer of a post or station is legally eligible for service on courts martial, either as a member or a judge advocate (see §§ 1490 and 1521, *ante*); and in small commands, surgeons and assistant surgeons are not unfrequently detailed upon such service. In view, however, of the fact that a medical officer of a post, with a hospital or sick men under his charge, is practically continuously "on duty" (see § 48, *ante*), besides requiring a considerable time for study, it is deemed to be in general prejudicial to the interests of the service to detail such officers upon courts martial where it can well be avoided. XXII, 536, *December, 1866*; XXIII, 522, *June, 1867*.

**1660.** Par. 1309, Army Regulations of 1863, authorized the employment, for officers or soldiers, of the services of a private physician at the expense of the United States "when the attendance of a medical officer cannot be had." Where the medical officer of a post declined to attempt a difficult operation required to be performed upon an officer, and recommended that an expert be employed, and a private physician was so employed accordingly, *advised* that the case was substantially within the provisions of the regulations, and that the reasonable account of such physician would properly be paid "by the medical bureau."<sup>1</sup> XXIX, 23, *June, 1869*.

**1661.** Medical practice by officers of the Medical Corps of the Army, outside of military posts, should conform to the laws of the State, but this is subject to the qualification that medical treatment of members of the Army on the active list, being an instrumentality of the United States government, cannot be controlled by State legislation, and may be furnished wherever the soldier may be stationed. Under A. R., 1451 (1654 of 1901), enlisted men on the retired list are allowed medical attendance at the stations of medical officers only. By par. 1450 (1653 of 1901), medical officers on duty are required to attend officers and enlisted men and when *practicable* their families. Medical officers in their attendance upon the families of officers and enlisted men, outside of military posts, would have to comply with the State laws; otherwise such attendance would not be "practicable." So in the treatment of civilians not living on military reservations, the laws of the State would have to be complied with. Card 3270, *June, 1899*.

#### MEMBER OF COURT.<sup>2</sup>

**1662.** A member of a court martial, though strictly answerable only to the convening authority for a neglect to be present at a session

<sup>1</sup> See now as to the employment and payment of "civil physicians," pars. 1452-1456, A. R. of 1895 (1655-1659 of 1901).

<sup>2</sup> As to the liability of members of courts martial to perform duty with their commands, see paragraph 918, Army Regulations of 1895 (1019 of 1901).

of the court, will properly, when prevented from attending, communicate the cause of his absence to the president or judge advocate, so that the same may be entered in the proceedings. Where a member, on reappearing after an absence from a session, fails to offer any explanation of such absence, it will be proper for the president of the court to ask of him such statement as to the cause of his absence as he may think proper to make.<sup>1</sup> XXX, 315, *May, 1870.*

1663. It does not invalidate the proceedings of a court martial that a member who has been present during a portion of the trial, and has then absented himself during a portion, has subsequently resumed his seat on the court and taken part in the trial and judgment. Nor is the legal validity of the proceedings affected by the adding of a *new* member to the court pending the trial. In either case, however, the testimony which has been introduced and the material proceedings which have been had while the new or absent member was not present should be communicated to him before he enters, or re-enters, upon his duties as a member. Such was the ruling of the Secretary of War on Genl. Hull's trial,<sup>2</sup> and this precedent was followed in repeated, though not frequent, cases during the civil war. For a member, however, who has been absent during a substantial part of a trial to return and take part in a conviction and sentence, is certainly a marked irregularity, and one which may well induce a disapproval of the findings and sentence in a case where there is reason to believe that the accused may have suffered material disadvantage from the member's action. VII, 128, 411, 467, *February and March, 1864*; VIII, 462, *July, 1864*; XXVII, 584, *March, 1869.*

1664. To add a *new* member to a military court after any material part of the trial has been gone through with, must always be a most undesirable measure, and one not to be resorted to except in an exceptional case and to prevent a failure of justice. Adding a member after

<sup>1</sup>See Court-Martial Manual 1901, p. 22, par. 3. It need scarcely be added that the absence of a member does not affect the legality of the proceedings, provided a quorum of members remain. See 7 Opins. At Gen., 101.

<sup>2</sup>See the reply dated March 7, 1814, of the Secretary of War, Hon. John Armstrong, to the communication of the "acting special judge advocate," Hon. Martin Van Buren, submitting questions for the court. (Forbes' Trial of Hull, Appendix, pp. 28-29.) It was indeed held by Attorney General Berrien (2 Opins. 411) that a member of a court martial who has absented himself during the taking of testimony is disqualified to take part in the sentence. Attorney General Cushing, however, held in a later opinion (7 Opins. 98) that whether the absent member should resume his seat and act upon his return "must depend upon his own views of propriety."

The Court-Martial Manual provides (p. 26, edition of 1898) that "no member who has been absent during the taking of evidence shall thereafter take part in the trial." This provision was at first viewed as mandatory and a failure to comply with it held to invalidate the sentence adjudged, but later the War Department apparently treated it as directory (see Circ. 21, A. G. O. 1899). It was, however, manifestly intended to enjoin a complete abandonment of the practice referred to in the text. See page 28, par. 4, edition of 1901.



all the testimony has been introduced, and nothing remains except the finding and sentence, is believed to be without precedent. XLI, 525, *March, 1879.*

1665. If a member, absent during the whole of the original proceedings had in a trial, is in fact present during proceedings had on revision to reconsider the sentence, the revised sentence is clearly illegal and should be declared void and set aside. Cards 4742, 4750, 4751, 4854, 4855, *August, 1898.*

1666. Where, in the course of a trial by court martial, a member of a court is served with a legal order in due form dismissing or discharging him from the military service, or an official communication notifying him of the acceptance of his resignation, he becomes thereupon separated from the army and can no longer act upon the court; he should therefore at once withdraw therefrom, and the fact of his withdrawal,<sup>1</sup> explained by a copy of the order, be entered upon the record. XI, 203, *December, 1864.* But where the term of service of a member as an officer of volunteers expired pending a trial by the court, *held* that the member was not thereupon disqualified, but could legally continue to act upon the court till actually discharged or mustered out of the service.<sup>2</sup> XV, 111, *March, 1865.*

1667. While it is in general undesirable that a member of a military court should testify as a witness at a trial had before such court, unless perhaps his testimony relates to character merely, yet the fact that he is called upon to testify, while it does not affect the validity of the proceedings,<sup>3</sup> does not operate to debar the member himself from the exercise of any of the duties or rights incident to his membership. He remains entitled to take part in all deliberations, including indeed those had in regard to the admissibility of questions put to himself or of his answers to questions. XXVI, 216, *November, 1867.*

1668. Where an officer, detailed as a member of a general court martial, was duly relieved by order therefrom, but continued notwithstanding to sit upon the court during a trial, taking part in the findings and sentence, *held* that the sentence should properly be set aside as null and void.<sup>4</sup> 41, 39, *May, 1890.*

<sup>1</sup> And the proceeding should be similar where a member is served with an order of the President placing him upon the retired list; retired officers not being legally competent to sit upon courts martial. But the receipt by a member, during the proceedings of the court, of an appointment to a higher rank, or of other official notice of his promotion, can affect in no manner his competency to act upon the court. The fact of the promotion should indeed be noted in the record and the officer be thereafter designated by his new rank.

<sup>2</sup> In a case in G. C. M. O. 104, Dept. of Kentucky, 1865, the proceedings were properly disapproved because a member had remained and acted upon the trial after receiving official notice of his muster-out.

<sup>3</sup> Compare *People v. Dehring*, 50 N. York, 374.

<sup>4</sup> See G. C. M. O. 20, Dept. of California, 1860, published after the date of this ruling.

**MILEAGE.<sup>1</sup>**

**1669.** An officer on leave of absence, whose leave, before being completed, is terminated by an order of competent authority requiring him to return at once to his station, is entitled to mileage for the return journey, upon duly complying with such order. XXXVI, 420, *April, 1875.*

**1670.** By the act of July 24, 1876, s. 2, "any officer" who "travels under orders" was entitled to a mileage allowance of "eight cents a mile for each mile actually traveled" by him under his order, provided he was not furnished transportation in any of the modes specified in the act. So, in a case of an officer who, while on leave of absence, was by an order from the Headquarters of the Army, placed on special duty in a bureau of the War Department, and, having been retained on such duty for a period extending by two weeks beyond the term of his leave, was, by a second order from the same source, formally relieved from such duty and ordered to return to his station, and thereupon duly returned accordingly: *held* that, in so returning, he was traveling "under orders" in the sense of the act, and was therefore entitled to mileage for the journey from Washington to such station.<sup>2</sup> XXXIX, 359, *December, 1877.*

**1671.** An officer, while on leave of absence, and a few days before its expiration, was placed on duty, and was kept on such duty during about a month after the expiration of the leave as originally granted, and was then ordered to the station of his company. *Held* that such order did not cause him to revert to the status of being on leave, but gave him the status, on his complying with it, of an officer "traveling on duty" and entitled to the mileage, &c., accorded by the act of February 27, 1893. 58, 475, *April, 1893.*

**1672.** Where an officer was required by a competent order to travel from his proper station to another post, to attend his own trial by court martial, and transportation was not furnished him,—*held* that he was entitled to mileage for such journey, the purpose for which the same was ordered to be made not being material. XXXIV, 339, *June, 1873.*

**1673.** An officer was duly ordered to proceed, in command of a guard for insane soldiers, from his station in California to Washington, the

<sup>1</sup> See the Army Appropriation Act of May 26, 1900, for the latest provisions in the matter of mileage to officers and contract surgeons. As noticeably new legislation, this act provides that "payment and settlement of mileage accounts of officers shall be made according to distances computed over routes established and by mileage tables prepared by the Paymaster General of the Army under the direction of the Secretary of War."

<sup>2</sup> *Held* otherwise, however, by the Court of Claims, in *Barr v. United States*, 14 Cl. Cls. 272.

order directing in effect that transportation be furnished both ways for him and his command. At Washington, while the guard—its service being performed—returned at once according to the original order, the officer was specially authorized, by an order issued from the Headquarters of the Army, to delay his return for thirty days. Returning at the end of this time to California, an order was issued by the department commander in which the modification of his duty and action under the second order was recognized, and he was declared to be entitled to mileage for the return journey and was thereupon paid the same accordingly. *Held* that there was no legal objection to the last order, and that the amount of mileage allowed thereby could not properly or fairly be stopped at a subsequent date against the officer's pay. XLIII, 91, *November, 1879.*

1674. A regiment was ordered under date of September 15, 1894, to make a change of station, "the movement to commence October 10th." An officer on duty with the regiment obtained, on September 24th, a leave of absence for twenty days and rejoined at the new station about October 14, 1894. *Held* that while he was equitably entitled to the amount which the Government would have paid for his transportation had he remained with his regiment, he did not perform the travel on duty without troops within the meaning of the law and was not, therefore, entitled to mileage.<sup>1</sup> Card 808, *December, 1894.*

1675. *Held* that an officer ordered from his station to witness the issue of annuity goods to Indians and to inspect beef cattle for the Indian service, having performed the travel without troops, was entitled to the mileage and cost of transportation authorized by the Army Appropriation Act of March 16, 1896; but *held* not so entitled where an officer duly detailed as an Indian agent performs a travel under orders of the Interior Department on duty connected with the Indian Service. Card 2949, *February, 1897.*

1676. Paragraph 959, A. R., as amended by G. O. 62, A. G. O., of 1899 (1063 of 1901), authorizes payment of mileage over the shortest usually travelled route at the rate of eight cents per mile, to a reporter of a court martial and his assistants, while going from the place of employment to the place of holding the court, provided the latter place is more than ten miles from the former. *Held*, that the regulation does not authorize payment of mileage for the return journey. Card 7101, *September, 1899.*

<sup>1</sup>When the station of an officer is changed while he is on leave of absence, he will, on joining his new station, if not furnished with transportation in kind, be entitled to mileage for actual expenses if for ocean travel for the excess of distance, if any, from the place of receipt of order to his new station, over the distance between that place and his old station. 7 Comp. Dec., 78. This is now incorporated in A. R. 1330, as amended by G. O. 121, A. G. O., 1900 (1483 of 1901).

**MILITARY COMMISSION—ORIGIN, CONSTITUTION, PROCEDURE, &c.**

1877. By a practice dating from 1847,<sup>1</sup> and renewed and firmly established during the civil war,<sup>2</sup> military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war-courts, resorted to for the reason that the jurisdiction of courts martial, creatures as they are of statute, is restricted by law, and cannot be extended to include certain classes of offences (see § 1690, *post*) which in war would go unpunished in the absence of a provisional forum for the trial of the offenders. Their authority is derived from the Law of War,<sup>3</sup> though in some cases their powers have been added to by statute.<sup>4</sup> Their competency has been recognized not only in acts of Congress<sup>5</sup> but in executive proclamations,<sup>6</sup> in rulings of the courts,<sup>7</sup> and in the opinions of

<sup>1</sup>See Maj. Gen. Scott's G. O. 20, Hdqrs. of Army, Tampico, Feb. 19, 1847, republished "with important additions," in G. O. 190 and 287 of the same year. And see the following orders convening military commissions, issued by Gen. Scott: G. O. 81, 83, 121, 124, 147, 171, 194, 215, 236, 267, 270, 273, 292, 334, 335, 380, 392. Hdqrs. of Army, 1847; also do. 9 of 1848. Also the following issued by Gen. Taylor: G. O. 66, 106, 112, 121, of 1847; and the following issued by Gen. Wool: G. O. 140, 170, 216, 483, 476, 511, of 1847.

In this connection, note also the institution by Gen. Scott of "Councils of War"—summary courts for the punishment of certain violations of the laws of war—as exhibited in G. O. 181, 184 and 372, Hdqrs. of Army, 1847, and do. 35 and 81 *id.* of 1848.

<sup>2</sup>The first military commission of the civil war is believed to have been that convened by Maj. Gen. Fremont, by G. O. 118, Western Dept., St. Louis, Sept. 2, 1861.

<sup>3</sup>See G. O. 100, War Dept., 1863, Sec. 1, par. No. 13; do. 1, Dept. of the Missouri, 1862, do. 20, Hdqrs. of Army, 1847; United States v. Reiter, 4 Am. Law Reg. (N. S.) 544; State v. Stillman, 7 Coldw. 341; Heffernan v. Porter, 6 *id.* 697. And see also opinions of the Attorney General cited under this section in note 1, p. 463.

<sup>4</sup>See act of March 3, 1863, c. 75, s. 30, declaring that, in time of war, &c., murder, manslaughter, robbery, larceny, and other specified crimes, when committed by persons in the military service, shall be punishable by sentence of court martial "or military commission," &c.; an enactment repeated, as to courts martial, in the 58th Article of War. Also, sec. 38 of the same act (repeated in Sec. 1343, Rev. Stat.) making spies triable by general court martial "or military commission" and punishable with death. See, further, act of July 2, 1864, c. 215, s. 1, by which commanders of departments and commanding generals in the field were authorized to carry into execution sentences imposed by military commission upon guerrillas. Also act of July 4, 1864, c. 253, secs. 6 and 8 (not now in force) making inspectors in the Quartermaster Department triable and punishable by sentence of court-martial or "military commission," for fraud or neglect of duty, as also other employees and officers of that department for accepting bribes from contractors, &c. Also the Reconstruction Act of March 2, 1867, c. 153, s. 3, by which commanders of military districts were authorized to convene military commissions for the trial of certain offenders. See § 1690, *post*.

<sup>5</sup>See the acts cited in last note, together with Sess. 1190, 1343 and 1344, Rev. Stat., as also the appropriation acts of July 24, 1876, Nov. 21, 1877, June 18, 1878, June 23, 1879, and May 4, 1880, in which, among other items for the Pay Department, appropriation is made "for compensation for citizen clerks and witnesses attending upon courts-martial and military commissions."

<sup>6</sup>See the proclamations of Sept. 24, 1862, and April 2, 1863.

<sup>7</sup>*Ex parte Vallandigham*, 1 Wall. 243; In the matter of Martin, 45 Barb. 146; State v. Stillman, 7 Coldw. 341. In the last case the court says: "A military commission is a tribunal now (1870) as well known and recognized in the laws of the United States as a court martial." It has been "recognized by the executive, legislative and judicial departments of the government of the United States."



the Attorneys General.<sup>1</sup> During the civil war they were employed in several thousand cases; more recently they were resorted to under the "Reconstruction" Act of 1867;<sup>2</sup> and still later one of these courts has been convened for the trial of Indians as offenders against the laws of war.<sup>3</sup> 41, 12-18, *May, 1890*.

1678. Except in so far as to invest military commissions in a few cases with a special jurisdiction and power of punishment,<sup>4</sup> the statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition or procedure. In consequence, the rules which apply in these particulars to general courts martial have almost uniformly been applied to military commissions. They have ordinarily been convened by the same officers as are authorized by the Articles of War to convene such courts; the accusations investigated by them have been presented in charges and specifications similar in form to those entertained by general courts; their proceedings have been similar and similarly recorded; and their sentences have been similarly passed upon and executed. I, 453, 465, *December, 1862*; II, 27, 83, 563, *February to June, 1863*; III, 428, *August, 1873*; V, 95, *October, 1863*; VII, 556, *April, 1864*; VIII, 111, *March, 1864*; XIII, 392, *February, 1865*; XXIX, 39, *June, 1869*. Their composition has also been the same, except that the *minimum* of members has been fixed by usage at *three*. XV, 149, *April, 1865*. They have generally also been supplied with a judge advocate as a prosecuting officer. A military commission constituted with less than three members, or which proceeded to trial with less than three members, or which was not attended by a judge advocate, would be contrary to precedent.<sup>5</sup> IX, 591, *September, 1864*; XI, 479, *February, 1865*; XIII, 286, *January, 1865*; XV, 204, *May, 1865*.

1679. In view of the analogy prevailing and sanctioned between these bodies and courts martial, *held* that military commissions would properly be sworn like general courts-martial (XI, 111, *November, 1864*); that the right of challenging their members should be afforded to the accused; that two-thirds of their members should concur in death sentences (XXIII, 650, *August, 1867*); and that the two-years limitation would properly be applied to prosecutions before them.<sup>6</sup> IX, 657, *September, 1864*.

<sup>1</sup> See 5 Opins. At. Gen. 55; 11 *id.*, 297; 12 *id.*, 332; 13 *id.*, 59; 14 *id.*, 249.

<sup>2</sup> See § 1690, *post*.

<sup>3</sup> The case of Modoc Indians tried by military commission in July 1873 (G. C. M. O. 32, War Dept. 1873). See 14 Opins. At. Gen. 249.

<sup>4</sup> See statutes cited in notes to preceding section.

<sup>5</sup> In the absence, however, of any statutory provision on the subject, a commission which departed from the general usage in any of these respects would not necessarily be held to be an illegal tribunal.

<sup>6</sup> None of these features, however, are made *essential* by statute.

## MILITARY COMMISSION—JURISDICTION.

1680. The jurisdiction of the military commission is derived primarily and mainly from the Law of War: that special authority has in some cases been devolved upon it by express legislation has already been noticed. Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offences, committed, whether by civilians<sup>1</sup> or military persons, either (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theatre of war, in which *martial law* has been established by competent authority.<sup>2</sup> The two classes of offences are: I. Violations of the laws of war. II. Civil crimes, which, because the civil authority is superseded by the military and the civil courts are closed or their functions suspended, cannot be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war, a jurisdiction of offences peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature of the State or district. II, 242, *April, 1863*; III, 404, *August, 1863*; VII, 20, 418, *January and March, 1864*; VIII, 153, 529, *March and June, 1864*; XX, 592, *March, 1866*.

1681. A military commission, whether exercising a jurisdiction strictly under the laws of war or as a substitute in time of war for the local criminal courts, may take cognizance of offences committed, during the war, *before* the initiation of the military government or martial law, but not then brought to trial. XIX, 390, *January, 1866*. (But as to spies, see § 2351, *post*.) So *held* that an enemy, taken prisoner of war, was triable by a military commission for a violation of the laws of war committed before his capture.<sup>3</sup> VIII, 529, *June, 1864*.

1682. During the civil war a very great number and variety of offences against the laws and usages of war—charged either, generally, as "violation of the laws of war," or, specifically, by their particular names or descriptions—were passed upon and punished by military commissions. Of these some of the principal (committed

<sup>1</sup> The general orders issued during the civil war contain nearly one hundred and fifty cases of *women* tried by military commissions.

<sup>2</sup> See § 1639, *ante*. And note, in this connection, Chief Justice Chase's description of the jurisdiction exercised under military government and martial law, as distinguished from that conferred by the military law proper—in *Ex parte Milligan*, 4 Wallace, 142.

<sup>3</sup> But when an officer or soldier of the enemy's army is, upon capture, charged before a military commission with a violation of the laws of war, the proof should of course be clear that the act committed was as charged, *i. e.* was *not* a legitimate act of war.

mostly by civilians) were as follows: Unauthorized trading or commercial intercourse with the enemy; unauthorized correspondence with the enemy; blockade running; mail carrying across the lines; drawing a bill of exchange upon an enemy, or by an enemy upon a party in a northern city;<sup>1</sup> dealing in, negotiating, or uttering Confederate securities or money;<sup>2</sup> manufacturing arms, &c., for the enemy; furnishing to an enemy articles contraband of war; dealing in such articles in violation of military orders; publicly expressing hostility to the U. S. government or sympathy with the enemy; coming within the lines of the army from the enemy without authority; violating a flag of truce; violation of an oath of allegiance, or of an amnesty oath; violation of parole by a prisoner of war; aiding prisoner of war to escape; unwarranted treatment of Federal prisoners of war; burning, destroying, or obstructing railroads, bridges, steamboats, &c., used in military operations; cutting telegraph wires between military posts; recruiting for the enemy within the Federal lines; engaging in "guerrilla" or partisan warfare; assisting Federal soldiers to desert; resisting or obstructing an enrolment or draft; impeding enlistments; violating orders in regard to selling liquor to soldiers or other military orders of police in a district under military government; attempt without success to aid the enemy by transporting to him articles contraband of war; conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy. II, 144, *April, 1863*; III, 401, 589, 649, *August and September, 1863*; IV, 320, *November, 1863*; V, 36, *September, 1863*; 390, *January, 1864*; VI, 20, *January, 1864*; VII, 413, *March, 1864*; VIII, 529, *June, 1864*; IX, 149, 202, 225, 481, 524, 535, *May to August, 1864*; X, 567, *November, 1864*; XI, 473, 513, *February and March, 1865*; XII, 125, *December, 1864*; 675, *June, 1865*; XVI, 446, *August, 1865*; XXI, 101, *December, 1865*, 280, *March, 1866*, &c.

1863. Of the ordinary crimes taken cognizance of under similar circumstances by these tribunals, the most frequent were homicides, and, after these, robbery, aggravated assault and battery, larceny, receiving stolen property, rape, arson, burglary, riot, breach of the peace, attempt to bribe public officers, embezzlement and misappropriation of public money or property, defrauding or attempting to defraud the United States, &c. VII, 418, *March, 1864*; VIII, 194, 529, *April and June, 1864*; XIV, 40, *January, 1865*; XV, 281, *May, 1865*; XVIII, 525, *January, 1866*; XIX, 319, 390, *January, 1866*; XXI, 225, *February, 1866*; XXII, 116, *August, 1866*; XXVII, 423, *Decem-*

<sup>1</sup>See *Britton v. Butler*, 9 Blatch., 457; *Williams v. Mobile Sav. Bk.*, 2 Woods, 501; *Woods v. Wilder*, 43 N. York 161, *Lox v. Sugarman*, 12 Heisk. 354.

<sup>2</sup>See *Horn v. Lockhart*, 17 Wallace, 580.

*her*, 1868; 522, *February*, 1869; XXIX, 157, 233, *August*, 1869; XXX, 380, 638, *May* and *September*, 1870, etc.

1684. Not unfrequently the crime, as charged and found, was a combination of the two species of offences above indicated. As in the case of the alleged killing, by shooting or unwarrantably harsh treatment, of officers or soldiers, after they had surrendered, or while they were held in confinement as prisoners of war; of which offences persons were in several cases during the war of the Rebellion convicted by military commissions under the charge of "murder, in violation of the laws of war."<sup>1</sup> VII, 360, *March*, 1864; XVII, 455, and XIX, 221, *October*, 1865; XX, 650, *May*, 1866.

1685. From the jurisdiction, however, of military commissions under the circumstances above indicated, are properly excepted such offences as are within the legal cognizance of the ordinary criminal courts, when, upon the establishing of military government or of the *status* of martial law, such courts have been, by express designation or in fact, left in full operation and possession of their usual powers. Thus, during the considerable period of the war pending which the District of Columbia was practically placed under a mild form of martial law (see § 1643, *ante*) ordinary criminal offences committed therein by civilians or military persons, of which there was not expressly vested by statute (as by the act of Feb. 3, 1863, c. 75, s. 30) a jurisdiction in military courts concurrent with that of the civil tribunals, were in general allowed to be taken cognizance of by the latter, the same being at no time seriously interrupted in the exercise of their judicial functions.

1686. So, in a State or district where military government or martial law has not prevailed, or having prevailed for a time has ceased to be exercised, and the regular criminal courts are open and in operation, a military commission cannot be empowered to assume jurisdiction of a public offence, although the nation be still involved in war.<sup>2</sup> IX, 657, *September*, 1864; XII, 422, *June*, 1865; XIV, 382, *April*, 1865; XVI, 298, *June*, 1865; XXX, 34, *July*, 1869. *A fortiori*, where, at the date of the offence, there was, properly, no state of war in which the nation was involved with an enemy. Thus *held*, that a military commission could not legally be convened for the trial of Indians, for violations of the laws of war, on account of thefts, robberies, and murders committed by them upon incursions made into the State of Texas where said

<sup>1</sup>See G. C. M. O. 607, War Dept., 1865, *do*, 153, *id.*, 1866. A more recent illustration was the principal offence of the Meade Indians (tried by military commission in July, 1873), which, as a treacherous killing of an enemy during a truce, was charged as "murder in violation of the laws of war." (G. C. M. O. 32, War Dept., 1873.)

<sup>2</sup>See the leading case of *Ex parte Milligan*, 4 Wallace, 1; also *Milligan v. Hovey*, 3 Bissell, 13; *In re Murphy*, Woolworth, 143; *Devlin v. United States*, 12 Ct. Cl., 271, 12 Opins. At. Gen., 125.



Indians (unlike the Modoca—see note to § 1684, *ante*) were mere raiders, with whose tribe, as such, the United States was not engaged in war, and whose crimes, therefore, were not committed *flagrante bello*.<sup>1</sup> XXXVI, 221, *January, 1875*.

1687. Where the State was not under martial law or military government, the fact that the offence was committed by a prisoner of war at a prison camp (within the State) for the confinement of prisoners of war, and guarded by Federal troops, was *held* insufficient to give a military commission jurisdiction of the case. XV, 358, *June, 1865*. But *held* that the mere fact of the appointing by the Executive of a "provisional governor" for an insurrectionary State in June, 1865, prior to the date of the proclamation (of April 2, 1866) declaring the war at an end in that State, and while the territory of the same still remained in military occupation, did not operate to oust military commissions of jurisdiction of criminal offences committed within the State.<sup>2</sup> XVI, 415, *July, 1865*.

1688. It is a further restriction upon the jurisdiction of the military commission that, except where it may be invested by statute with a jurisdiction *concurrent* with that of courts martial (as by secs. 30 and 38 of the act of March 3, 1863), its authority cannot be extended to the trial of offences which are, specifically or in general terms, made cognizable and punishable by courts martial by the Articles of War or other statute. In repeated instances during the civil war the proceedings of military commissions, in cases in which these tribunals had improperly assumed jurisdiction of offences legally triable by courts martial only, were recommended by the Judge Advocate General to be disapproved. I, 468, 482, *December, 1862*; VII, 440, 486, *April, 1864*; IX, 236, *June, 1864*; XV, 373, *June, 1865*; XVI, 73, *April, 1865*; XIX, 63, *October, 1865*.

1689. As to the special *statutory jurisdiction* with which the military commission has, in certain cases, been invested, the acts of Congress by which this has been conferred and defined have already been cited. Of these, the provisions of the act of March 3, 1863, by which a jurisdiction, concurrent with that of the court martial, is given to this tribunal in cases of *spies*, is the only one now in force, being embodied in Sec. 1343, Rev. Sts.

<sup>1</sup>As to the nature of the hostility which may properly bring Indians "within the description of public enemies," compare 13 Opins. At. Gen., 471. That a detached band of marauding Indians was not an "enemy" in the sense of the act of Mch. 3, 1849 (sec. 3483, Rev. Sts.), providing for the making good of damage sustained by the capture or destruction of certain property "by an enemy", was held by the Supreme Court in *Stuart v. United States*, 18 Wallace, 84.

<sup>2</sup>See *Belding v. State*, 25 Ark., 315. Also compare 13 Opins. At. Gen., 65-6; *Coleman v. Tennessee*, 7 Otto, 516.

**1690.** Under the latest of these acts, the "Reconstruction" Act of March 3, 1867, in sec. 3 of which the commanders of the military districts constituted thereby were empowered, in their discretion, "to organize military commissions," in lieu of the "local civil tribunals," for the trial and punishment of "all disturbers of the public peace and criminals,"<sup>1</sup>—it was *held* by the Judge-Advocate General as follows:

(a) That the military commissions convened under the act would properly be governed, as to their form of procedure, by the rules and forms governing military commissions under the laws of war (see § 1678, *ante*), while, as to their jurisdiction and power of punishment, they would in general properly be regulated by the local statutes governing the courts for which they were substitutes. XXIX, 406, *November, 1869*.

(b) That, being substitutes for the State criminal courts, they were authorized to take cognizance of offences committed (but not brought to trial) *before* the date of the act, equally with those committed *after* such date. XXV, 424, *March, 1868*; XXVI, 234, *November, 1867*.

(c) That cases of soldiers offending against the criminal law, whose offences were not within the jurisdiction of a court martial, might legally be brought to trial before military commissions convened under the act. XXVI, 487, *March, 1868*.

(d) That commissions ordered under this act, being in lieu of the State tribunals, could not assume to take cognizance of a case within the jurisdiction of a court of the United States in operation in the district. XXVIII, 612, *May, 1869*.

(e) That sentences duly adjudged by commissions convened under this statute, and which had been duly and finally approved by the competent authority (see sec. 4 of the statute) might legally be executed prior to the passage of the act admitting to representation in Congress the State in which the offence was committed; but that such sentences, not carried into effect (or of which the execution had not been entered upon) at that date, could not thereafter legally be enforced.<sup>2</sup> And *held* generally, that all proceedings of military commissions which remained pending or incomplete at such date became thereupon terminated. XXVII, 89, 90, 93, *July, 1868*; XXVIII, 51, *August, 1868*; XXIX, 620, *January, 1870*; XXX, 181, *March, 1870*.

**1691.** The jurisdiction of a military commission convened under the

<sup>1</sup>The constitutionality of this act and the legality of the institution under it of military commissions were affirmed by At. Gen. Blair in 13 Opns., 59-67.

<sup>2</sup>Compare *United States v. Tynen*, 11 Wallace, 88, where it is held that, "there can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence." And to a similar effect, see *United States v. Finlay*, 1 Ab., U. S. R., 364.

law of war may be exercised up to the date of a peace agreed upon between the hostile parties or the declaration by the competent authority of the termination of the war status.<sup>1</sup> XX, 484, *March, 1866*.

1692. A military commission, convened for the trial of offences under the law of war, has no jurisdiction of civil suits or proceedings, either based upon contract or brought to recover damages on account of private transactions or personal injuries.<sup>2</sup> III, 190, *July, 1863*; V, 86, *October, 1863*; IX, 205, *May, 1864*; XI, 637, *April, 1865*.

#### MILITARY COMMISSION—SENTENCE.

1693. Except in a case of a spy whose sentence must be death (Sec. 1343, Rev. Sts.), the discretion of the military commission in the imposition of sentence is not in terms restricted or defined by the existing law. VII, 62, *January, 1864*. The sentence, however, should award a criminal punishment; a judgment of debt or damages, on conviction of a criminal offence, would be irregular and properly disapproved. III, 190, *July, 1863*. Where a military commission was acting under the reconstruction laws, practically as a substitute for a State criminal court, *held* that it should, in general, in determining the proper measure of punishment to be inflicted, take into consideration the State statute law, if any, prescribing the penalty or penalties for the offence.<sup>3</sup> XXIX, 406, *November, 1869*.

1694. A military commission before which an enlisted man has been legally tried and convicted is empowered to include in his sentence the punishment of dishonorable discharge. Trials indeed of soldiers by military commission have not been frequent, and sentences adjudged by them of dishonorable discharge have been still more rare. 41, 18, *May, 1890*; 52, 96, *February, 1892*; 60, 164, 244, *June, 1893*.

#### MILITARY OFFENCE.

1695. Military offences proper are simply violations of the laws, orders, or rules of discipline governing the military state. Such offences are neither "felonies" nor "misdemeanors" in the legal sense

<sup>1</sup> See 14 Opins. At. Gen., 250, where this principle is applied to an Indian war. See also 5 *id.*, 58.

<sup>2</sup> See State v. Stillman, 7 Coldw., 341, G. O. 1, Dept. of the Missouri, 1862. As to the *ex post facto* jurisdiction of special courts and commissions instituted during the civil war, see note to § 1577, *ante*.

<sup>3</sup> Except where the death sentence was pronounced, the punishment adjudged by military commissions during the war of the rebellion was, in the great majority of cases, an imprisonment for a certain term or "till the end of the war." Fines were sometimes imposed and a sending beyond the lines of the U. S. forces was not infrequent. A confiscation of property was also occasionally adjudged. In many instances, in lieu of any punishment, it was directed or recommended by the commission that the accused be required to take an oath of allegiance, or give a parole, and in some cases also to give a bond for future loyal behavior.

of those terms, nor can an officer or soldier, convicted of an offence of this class, properly be subjected to any of the consequences attaching to a felony. LIII, 14, *September, 1886*; 27, 71, *September, 1888*. Thus *held* that a soldier convicted by a court martial, assembled within the State of Kansas, of the offence of swearing falsely as a witness before a previous military court, could not be subjected to any disability attaching to a conviction of perjury as a felony by the laws of that State; his offence, as found, not being a civil crime but simply "conduct to the prejudice of good order and military discipline."<sup>1</sup> XXXVIII, 219, *August, 1876*.

#### MILITARY PRISON.<sup>2</sup>

1696. The proceeds of sales of articles manufactured by the prisoners at the military prison are clearly public funds, and, in the absence of any statutory provision in regard to their disposition—Sec. 1351, Rev. Sts., only requiring that they shall be "accounted for" as received by the commandant—cannot legally be expended in repairing or improving the prison building, or otherwise, without authority of Congress. XLII, 24, *October, 1878*.

1697. *Held* that, under the general authority vested in the Secretary of War by Sec. 1351, Rev. Sts., to direct as to the disposition of the articles manufactured by the convicts at the military prison at Leavenworth, and in the absence of anything in Sec. 3716, Rev. Sts., or elsewhere in the statute law relating to contracts, precluding such action, the Secretary was empowered to order that the shoes made by the prisoners should be turned over to the Quartermaster Department for issue to the army. XLI, 427, *October, 1878*.

1698. *Held* that the provisions of Secs. 1345 and 1346, Rev. Sts., in respect to the organizing, &c., by the Secretary of War, of the board of government of the military prison, did not simply vest a discretion in the Secretary to do or not to do, in whole or in part, as therein prescribed, but, imposing as they did a public duty, should be construed as mandatory upon him, and thus as properly requiring him to maintain such board with the members, both military and civil, as specified in the former section, and with it to visit the prison as directed in Sec. 1346. XLI, 675, *September, 1879*.

<sup>1</sup> The term "convicted of a felony" employed in Sec. 1118, Rev. Sts., as amended by the act of Feb. 27, 1877, forbidding the enlistment of persons "convicted of a felony" refers clearly to a conviction by a criminal court of the United States, or of a State or Territory, or of the District of Columbia, of an offence made a felony by the laws of the same, or by the common law as recognized therein.

<sup>2</sup> The military prison here referred to was the military prison at Fort Leavenworth, Kans. The Sundry Civil Act of March 2, 1895, provided for its transfer from the Department of War to the Department of Justice, the prison to be thereafter known as the United States Penitentiary, and the transfer was duly effected.



MILITARY RESERVATION.<sup>1</sup>

1699. A military reservation, being simply territory of the United States withdrawn from sale, pre-emption, &c.,<sup>2</sup> the mere fact of the

<sup>1</sup>The Constitution (Art. IV, Sec. 3, par. 2) has vested in Congress the exclusive power "to dispose of and make all needful rules and regulations respecting the territory" held in *U. S. v. Gratiot*, 14 Peters, 537, to mean "lands"; "or other property belonging to the United States." As a consequence perhaps of the indefiniteness of this grant see 7 Opins. At Gen. 574; no general enactment providing for the setting apart of land for military reservations has ever been made by Congress. In a few cases, indeed, a special authority to establish a military reserve has been conferred upon the President by statute, but the great majority of the military reservations heretofore located or now existing have been made by the President without any such specific authority whatever. But though no general authority has been directly given by Congress for the reserving of lands for military purposes, an authority for the purpose has been deemed to exist, and this authority is found in the *usage* of the Executive department of the Government, as indirectly sanctioned by Congress in repeated pre-emption acts, acts relating to the survey of the public domain, appropriation acts, &c., in which lands reserved for military purposes by the President have been in general terms excepted from sale, exempted from entry, &c., or special provision has been made for the cost of improvements to be erected upon the same. In *Grisar v. McDonald*, 6 Wallace, 381, the U. S. Supreme Court, by Field J., observes:—"From an early period in the history of the Government, it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress." The court then cites several statutes as containing this recognition, including the pre-emption acts of May 20, 1830, and Sept. 4, 1841, and adds: "The action of the President in the making the (military) reservations" (the title to which was at issue in the particular case) "was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them." And see 12 Opins. At Gen. 381, 14 *id.*, 182, 17 *id.*, 258; *Wilcox v. Jackson*, 13 Peters, 512; *U. S. v. Hare*, 4 Sawyer, 653; also *U. S. v. R. R. Bridge Co.*, 6 McLean, 517; 1 Land Dec. (Int. Dept.), 30, 702, 6 *id.*, 18, 117; 13 *id.*, 426, 607, 628; 8 Fed. Rep. 883; 12 *id.*, 449; 92 U. S., 733, 101 *id.*, 768; 5 Wall., 681.

It is moreover to be noted that the provision of the act of 1841, referred to by the Supreme Court, has been incorporated as a general enactment in the Revised Statutes, in the Chapter (Ch. 4 of Title XXXII) on pre-emptions, Sec. 2258 expressly excepting from the lands of the United States "subject to the rights of pre-emption"—"lands included in any *reservation* by any treaty, law, or proclamation, of the President for any purpose." And see Sec. 2393, specifically excepting military reservations from the operation of the laws authorizing the establishing of town sites.

The "proclamation" of the President reserving lands for military purposes is usually in the form of a military general order, issued by the Secretary of War whose act in this, as in other administrative proceedings pertaining to the military administration, is in legal contemplation the act of the President whom he represents. See § 2294, *post*. But no head of a department or executive official inferior to the President can, of his own authority, make a reservation of public lands. The power is vested only in Congress and the President. *United States v. Hare*, 4 Sawyer 653, 669.

In this connection may be noted the ruling of Atty. Gen. Bates (10 Opins., 359) in opposition to that of Justice McLean of the Supreme Court in *United States v. The Railroad Bridge Co.*, 6 McLean 517, but apparently concurred in by Atty. Gen. Williams (14 Opins., 246) to the effect that where a tract of land of the United States has once been legally reserved for military purposes, the President is not empowered, in the absence of authority from Congress, to *relinquish* such reservation and restore the land reserved to the general body of the public lands. See, also, 2 Land Dec. (Int. Dept.), 603, 606; 5 *id.*, 632; 6 *id.*, 19.

<sup>2</sup>See 7 Opins. At Gen., 574-5; also 14 *id.*, 557. That it is "not open to the courts on a question of jurisdiction to inquire what may be the actual uses to which any portion of the reserve is temporarily put," see *Benson v. U. S.*, 146 U. S., 331.

establishing of such a reservation cannot affect the power of the State or Territorial authorities (according as it may be located in a State or Territory) to serve civil or criminal process therein, or to attach or levy upon personal property,<sup>1</sup> except in so far of course as such service may be specially precluded or restricted, by law, as to military persons in general.<sup>2</sup> Where indeed there has been a cession of exclusive jurisdiction over the land by the State to the United States, the question whether the State authorities may still serve process within the reservation on account of liabilities incurred or crimes committed outside of its limits, will depend upon the terms of the cession. XXXIX, 541, *May, 1878*.

1700. Held that an act of Congress granting a railroad company a right of way through "the public lands" of the United States, did not authorize it to enter and construct a track upon the soil of a military reservation, the same being no part of the "public lands";<sup>3</sup> and that such entry was therefore a trespass. XXXIX, 146, *August, 1877*. Similarly *held* where the acts granted rights of way through the Indian Territory and Indian reservations, lands and allotments. Cards 6840, *September, 1899*; 7572, *February, 1900*.

1701. Land which has been set apart as a portion of an Indian reservation under a treaty can not be occupied as a military reserve;<sup>4</sup> nor can even a military post be maintained thereon, in derogation of the terms of the treaty or against the consent of the Interior Department. XXXVIII, 179, *July, 1876*.

1702. *Held* that the act of March 3, 1875, c. 151, "to protect ornamental and other trees on government reservations and on lands purchased by the United States," &c., which makes penal the unlawful cutting or injuring of such trees, was clearly not intended to, and did not, preclude the reasonable cutting of wood on military reservations, under the direction of the proper officer, for the supplying of the necessary fuel for the garrisons stationed thereon; the authority to establish a reservation, where in fact lawfully existing, being deemed to include an authority to efficiently maintain the same when established. XXXIX, 8, *May, 1876*.

<sup>1</sup> See opinion of Judge-Advocate General published in G. O. 30, Hdqrs. of Army, 1878, also § 673, *ante*.

<sup>2</sup> As by Sec. 1237, Rev. Sts., exempting enlisted men from arrest for certain debts, or by the operation of the provisions of the 59th Article of War as to the form to be observed in making criminal arrests of military persons. And see §§ 739 and 740, *ante*.

<sup>3</sup> Wilcox v. Jackson, 13 Peters 499, 513, 5 Opins. At Gen. 578, 6 *id.*, 670, 7 *id.*, 574.

<sup>4</sup> By Art. VI, par. 2, of the Constitution "all treaties made . . . under the authority of the United States" are declared to be "the supreme law of the land;" and Indian reservations "have generally been made through the exercise of the treaty-making power, and in fulfillment of treaty obligations." 14 Opins. At Gen., 182. That land cannot be reserved or occupied for military purposes to the prejudice of a title previously vested in an individual or a corporation, see, further, 9 *id.*, 339, 13 *id.*, 469.

1703. *Held* that the right to the "free and open exploration and purchase" of mineral lands, accorded to citizens, &c., by Sec. 2319, Rev. Sts., could not authorize an entry for the purpose of prospecting for mines upon a military reservation once duly defined and established by the President; the mineral lands intended by the statute being clearly such as are included within the "public lands" of the United States.<sup>1</sup> XXXVIII, 596, *May, 1877*.

1704. Where certain persons had entered unlawfully upon a military reservation and had proceeded to cultivate the soil of the same for their personal benefit and to lead off water, needed for the use of the garrison, in order to irrigate the ground so cultivated, — *advised* that the commandant be instructed to give such persons reasonable notice to quit with their property, and if they did not comply, to remove them by military force beyond the limits of the reservation.<sup>2</sup> XLII, 256, *April, 1879*.

1705. In the absence of any statute directly or by necessary implication extending the powers of the local government of the District of Columbia over the military reservation and post at the arsenal in Washington, *held*, that the health officer appointed by the Commissioners (constituting such government) would not be empowered of his own authority and without the consent of the military commander, to enter upon such reservation, and remove or abate a nuisance deemed by him to exist thereon. The effect of the legislation in regard to the government of the District is to except therefrom the public buildings and grounds of the United States, which are left to the charge of certain specified officials. Even farther removed from such government is the reservation at the arsenal, the same being a military post commanded by the President through a military subordinate, and governed by military orders and regulations. XLII, 270, *May, 1879*.

1706. The President's power in the matter of military reservations is limited to the setting apart and declaring of the reservation; and, for the purpose of adding to, and modifying the boundaries of, the original reserved tract, a reservation may be re-declared by the Executive. 39, 132, *February, 1890*; 50, 108, *October, 1891*. But the President cannot un-reserve duly reserved lands, either by revoking the order of reservation or otherwise. 50, 108, *supra*.

1707. After lands have once been reserved for military purposes, the President, in the absence of authority from Congress, is not empowered to withdraw or restore them. By the authority indeed of the act of July 5, 1884, he may abandon a useless military reservation

<sup>1</sup> See authorities cited in note to § 1700, *ante*.

<sup>2</sup> As to the authority to remove trespassers from military reservations, see 3 Opina At Gen., 268, *Id.*, 106, 476, G. O. 74, Hdqrs. of Army, 1869.

and turn the lands over to the Interior Department for disposition and sale. But he cannot re-reserve lands once thus turned over, they being no longer a part of the public domain but lands in regard to which Congress has expressed a different will. Nor can he reserve public lands for use of a sovereignty other than the United States—as for the use of a State. 48, 10, *June, 1891*; Card 1839, *November, 1895*.

1708. Where it was proposed to turn over to the Interior Department, under the act of July 5, 1884, a military reservation as “useless for military purposes,” but subject to the provisions of a contract permitting a contractor to take therefrom 2,000 cords of wood, for a military post, *advised* that the transfer be deferred until the contract was performed, the reservation not being “useless for military purposes” during the existence of the contract, and furthermore such contract might interfere with the sale of the land by the Interior Department. Card 54, *July, 1894*.

1709. Land once duly reserved for a public purpose becomes separated from the mass of public lands. So *held* that a proclamation of the President, issued under an act of Congress, opening to settlement lands in Oklahoma Territory, could not embrace or affect land previously duly reserved as a military timber reservation for the use of the post of Fort Reno. 31, 327, *April, 1889*.

1710. The power of the President, under the provision of the act of March 3, 1893, to “withhold from sale, and to grant for public use to municipal corporations in which the same is situated, all or any portion of any abandoned military reservation not exceeding twenty acres in one place,” extends only to such abandoned military reservations or parts of abandoned military reservations as have been turned over by the Secretary of War to the Secretary of the Interior under the act of July 5, 1884. 58, 471, *April, 1894*.

1711. The ownership and jurisdiction of the soil between high and low water mark on navigable waters within or bordering upon a State are vested in the State, not in the United States. Tide-lands belong to the State only; the United States has no interest in the soil below high water mark other than such as may have been ceded by the State.<sup>1</sup> XLVII, 596, *February, 1886*; 15, 452, *March, 1887*. So, where a military reservation, within a State, fronted upon navigable waters of the United States, at the mouth of the Columbia River, *held* that the military authorities could not, by the removal of fishing nets or fish traps placed below high water mark, or otherwise, legally prevent or interfere with the exercise of the right of fishery as to scale or shell fish

<sup>1</sup> Pollard's Lessees v. Hagan, 3 Howard, 212; Goodtitle v. Kibbe, 9 *id.*, 477; Doe v. Beche, 13 *id.*, 25; 6 Opins. At. Gen., 172. But see NAVIGATIONS.



on the tide-lands; such right being common to all citizens except in so far as it may be abridged by the State.<sup>1</sup> LII, 137, *March, 1887*.

1712. In the case of a Territory, however, the sovereign right to the whole soil is exclusively in the United States. Thus the reservation of an island in the tide-waters of a Territory includes not only its soil down to high-water mark but all its tide-lands also.<sup>2</sup> XLVII, 596, *February, 1886*. But in a Territory, in the absence of special regulation of the subject by Congress, no executive authority can lawfully restrict the common-law right of piscary of the inhabitants (including the taking of shell-fish) in the tide-waters of the Territory. So, the commander of a reserved military post, fronting upon navigable water of a Territory, is not empowered to remove from such tide-waters the seines or traps of fishermen; though, if the public interests require it, he may forbid or restrict the use of the shore above high-water mark for the hauling of seines or landing of fish. 15, 452, *March, 1887*.

1713. Squatters and other trespassers and intruders may and should be expelled, by military force if necessary, from a military reservation.<sup>3</sup> XLIX, 208, *July, 1885*; L, 314, *May, 1886*. But such persons when they have been suffered to own and occupy buildings on a reservation should be allowed reasonable time to remove them. If not removed after due notice the same should be removed by the military. Material abandoned on a reservation by a trespasser, on vacating, may lawfully be utilized by the commander for completing roads, walks, &c. L, 273, 378, *May and June, 1886*. Squatters on U. S. reservations (timbered) may also be forced therefrom by criminal proceedings had under Sec. 5388, Rev. Sts., or ejected by civil action. Card 138, *September, 1894*.

1714. Where squatters have made any considerable improvements upon a reservation, and their value has been duly estimated—as by a board constituted by the department commander and presenting in its report all the evidence on the subject,—an award by the Secretary of War, acquiesced in by the claimant, may be sued upon in the Court of Claims, which (in the absence of evidence of fraud or mistake) will accept such award as conclusive.<sup>4</sup> 17, 265, *June, 1887*.

1715. The cutting of timber on a military reservation is an offence against the United States, made punishable by Sec. 5388, Rev. Sts. (amended by the act of June 4, 1888), and by the act of March 3, 1875, c. 151. So, grass cut on a reservation and removed as hay would be

<sup>1</sup> Washburn, Easements and Servitudes, 410; *Martin v. Waddell*, 16 Peters, 367; *Smith v. Maryland*, 18 Howard, 71; *McCreedy v. Virginia*, 94 U. S., 391; *Lay v. King*, 5 Day, 72; *Arnold v. Mundy*, 1 Halst., 1; *Parker v. Cutler, &c., Co.*, 20 Maine, 353; *Moulton v. Libbey*, 37 *id.*, 472; *Weston v. Sampson*, 8 Cush., 347.

<sup>2</sup> See G. O. 62 of 1869.

<sup>3</sup> *Maddux v. U. S.*, 20 Cl. Cls., 193, 199.

personal property of which the asportation would be larceny under the act of March 3, 1875, c. 144. And persons coming upon a military reservation for the purpose of cutting wood or grass or to plough up the soil, or commit other trespass, may be removed as intruders, and the post commander should not hesitate to resort to military force if necessary for the purpose. And he may of course prevent such trespassers from carrying off with them any property of the United States. 64, 270, 303, *March and April, 1894*; Card 3315, *June, 1897*.

1716. There is no statute which would authorize the sale of timber on military reservations, and in the absence of such a statute the Secretary of War cannot authorize such sale. Card 8141, *May, 1900*.

1717. The general principle of the authority to remove trespassers, their structures and property, from land of the United States embraced in a military reservation, *held* specially applicable where the intrusion was for an injurious purpose, as where the object was to lay a sewer intended to discharge into a main sewer constructed by the United States upon and for the use of its own premises. In this instance, as the trespass was committed by the authorities of a municipality, *advised* that reasonable notice be given them to remove their property before resorting to military force for the purpose, and meantime that precautions be taken to prevent a connection between the proposed sewer and the sewers under the control of the United States. 65, 6, *May, 1894*.

1718. *Held* that a butcher who was under contract with the United States to supply beef to the post of Fort Brown, Texas, should not be permitted to sell beef on the reservation to citizens of the town, to the prejudice of the butchers doing business there. Such a party is not a post-trader, and Congress, in providing specifically for post-traders, would seem to have considered legislation necessary to authorize an individual to engage in trade or traffic at a military post. 30, 475, *March, 1889*.

1719. The State of Kansas having surrendered to the United States its jurisdiction over the military reservations of Forts Leavenworth and Riley by an act of its legislature of February 23, 1872, which was earlier in date than the prohibition laws of the State (having their origin in the Constitution adopted November 2, 1880). — *held* that such laws did not extend over and could not be applied to those reservations. 39, 17, *February, 1890*.

1720. To legalize the use of a public road (State, county, or Territorial) across a corner of a military reservation, *held* as follows: (1.) The Secretary of War may, under the act of July 5, 1884, s. 6, permit the extension of such a road across a military reservation "when ever, in his judgment, the same can be done without injury to the

reservation or inconvenience to the military forces stationed thereon." (2.) Or he can abandon to the Secretary of the Interior, under the same act, the strip of the reservation to be traversed by the road, and the latter official can then authorize the road under Sec. 2477, Rev. Sts., by which "rights of way for the construction of highways are granted over public lands not reserved for public uses." 43, 415, *November, 1890.*

1721. Where the United States purchased land for a military reservation, through which there was a public highway, and exclusive jurisdiction over the reservation was duly ceded to the United States, it was *held* that the title was subject to the easement of the public to the use of the highway; that the right to regulate and dispose of this easement was in the United States to be exercised by Congress; and that it could not be legally exercised by the military authorities. Card 3565, *October, 1897.*

1722. In locating Fort Missoula, Montana, an error of survey was made by which the post became established upon a section which had been granted to the State by the enabling act as school land, instead of upon the contiguous section which had been reserved for military purposes. *Recommended*, as the preferable mode of rectifying the error, that legislation of Congress be obtained granting to the State for school land the section omitted to be occupied, and, upon its acceptance by the State, that the legislature then cede to the United States exclusive jurisdiction over the section actually occupied by the post. 36, 402, *November, 1889*; 44, 299, *December, 1890.*

#### MILITIA.

1723. The manner of the calling out of the militia by the President under the act of 1795 (Sec. 1642, Rev. Sts.), is indicated by the Supreme Court in the leading case of *Houston v. Moore*,<sup>1</sup> where it is observed that, "the President's orders may be given to the chief executive magistrate of the State, or to any militia officer he may think proper." The call would ordinarily be addressed to the governor, who, in most of the States, is made commander-in-chief of the active militia of the State. A further form indeed of calling out the militia, viz., by a conscription, was authorized during the civil war by the act of July 17, 1862. 51, 325, *January, 1892.*

1724. The President has no original authority over the militia by right of his office. He can only call them out when Congress provides for his doing so as the agent of the United States for such purpose.

<sup>1</sup>5 Wheaton, 15 (1820)

When the call is complied with, the militia becomes national militia, and he becomes their commander-in-chief. The law governing his exercise of power in calling out is found in Secs. 1642, 5297, 5298 and 5299, Rev. Sts. 51, 120, *December, 1891*.

1725. The calling forth of the militia into the U. S. service is an administrative function, a ministerial act, in which the Secretary of War may issue the necessary orders as the organ of the Executive; and his act is the act of the President. 61, 55, *August, 1893*.

1726. It is not essential for a militia organization that there should be a formal muster-in, to bring it into the actual service of the United States. The provision of the act of 1862, relating to the muster-in of militia, is directory only. 38, 127, *January, 1890*.

1727. The President, in calling out a force of militia, authorized the governor of a State to designate the particular militia of that State to be included in the call, and the governor thereupon designated a certain regiment, and formally accepted its service. *Held* that in so doing he acted as the agent of the President, and that his acceptance was in law an acceptance by the President, and was equivalent to a muster-in of the regiment. 64, 483, *May, 1894*; Card 2806, *December, 1896*.

1728. In 1836, an Indian agent in Indiana applied for assistance, in an emergency, to a militia colonel who furnished three companies of his regiment, which were employed and rendered faithful service for seven days in assisting to execute the laws of the United States. Upon a claim now (1893) made for compensation for such service, *held* that the same could not legally be allowed by the Secretary of War, who could have no authority to recognize, as in the U. S. service, militia who had not been called out by the President or by his direction; and that such claim could be entertained by Congress alone. 60, 475, *July, 1893*.

1729. In the exercise of its constitutional power "to provide for calling forth the militia," and "to provide for organizing" the same, &c., Congress has made no distinction between any different portions of this force, or recognized any such portion as "national guard." The law relating to the subject Rev. Sts., Title XVI, Secs. 1625, 1642, &c., contemplates but a single integral body as constituting the militia and as liable to be called out. Under the existing law, the "national guard" of a State cannot legally be called out as such. Upon a call, the governor may indeed order them out, as being organized and available, so far as they will go to make up the number of the militia required. 52, 371, *March, 1892*.

1730. The U. S. statutes take no notice of "national guard" as such. If called out, it is not as "national guard" but as militia; and when



so called forth or included in a call, it must be governed by the existing laws providing for the organization, discipline, &c., of the militia. 51, 277, *January, 1892.*

1731. "National guard" is a term by which several of the States have, by law, designated a part of their militia, usually the organized and trained part. The President can, under the Constitution and laws of the United States, only call into the service of the United States the militia of the States. He can therefore so call a particular national guard only as, and because it is, a part or all of the militia of some one of the States. Card 2482, *July, 1896.*

1732. Under its constitutional power to provide for calling forth the militia, Congress has by Sec. 1642, Rev. Sts., provided for calling it into the service of the United States. The States having surrendered this power to Congress, and Congress having thus exercised it, the matter cannot be limited or in any way modified by a State law. There may, however, be a legitimate field for State legislation in connection with this subject. That is, there may be State legislation in aid of the United States laws and the power of the President in the premises. But in view of the fact that by Sec. 1649, Rev. Sts., it is made a punishable offence, for a militia man to fail to obey the orders of the President when he calls out the militia, such legislation is apparently unnecessary. Card 2482, *July, 1896.*

1733. There is no existing statute of the United States authorizing the President to call out the militia for *drill* merely. The Constitution, in empowering Congress "to provide for organizing, arming and disciplining the militia," leaves their training to the States, and it is at least doubtful whether an act of Congress regulating the drill of the militia would be constitutional. 51, 277, *January, 1892.*

1734. The "national guard" so-called, being merely militia, cannot (where not called forth) be "supported" or "maintained" by Congress, which is authorized by the Constitution to "support" and "maintain" the army and navy only. So, officers of the national guard can not be *commissioned* by the President without a violation of the Constitution, which "reserves the appointment of militia officers to the States respectively." 49, 292, *September, 1891.*

1735. Sec. 1658, Rev. Sts., prescribes that, "courts martial for the trial of militia shall be composed of militia officers only." *Held* that the enactment applied also in principle to *courts of inquiry* convened in the militia, and that officers of the army could not, for purposes of instruction or assistance, legally be detailed to be associated with militia officers as members of such courts. 60, 168, *June, 1893.*

1736. Where militia are called out and mustered into actual service, the staff officers of their commanding general can not be considered as

in any sense appointed by the Secretary of War or commissioned by the President. Nor are they given the corresponding rank of staff officers of the regular army, but their rank remains the same as it was before in the militia under the State laws. 44, 478, *January, 1891*.

1737. Where arms were issued to a State for the use of its militia under the old law of 1808 to 1855, incorporated in Secs. 1661 and 1667, Rev. Sts., and the State was not indebted to the United States under that law, *held* that such law made no provision for accountability in regard to such arms, and that the new law on the subject of the issue of such arms, the act of February 12, 1887, s. 4, in requiring the inspection, sale, &c., of unserviceable arms, did not apply to arms issued under the old law, as to which or as to the proceeds of which if sold, the United States had no power of disposition. LII, 659, *October, 1887*.

1738. Under Sec. 1661, Rev. Sts., as amended by the act of February 12, 1887, the Secretary of War, for the United States, issues to the militia of the various States and Territories, for use, arms and other property belonging to the United States and which continue to be the property of the United States while being so used. This property is purchased or manufactured in the same manner as are the stores for the regular army, but out of an annual appropriation of \$400,000 made for the purpose of providing arms, etc., "for issue to the militia." So far as the militia organizations of the State are concerned their right to receive a portion of the property purchased out of the \$400,000 appropriated for a particular year depends on whether their respective States are maintaining a given number of organized militia at that time. That is, if a State has 100 organized militia for each senator and each representative it has in the Congress of the United States, its militia is entitled to receive a portion of the benefits of the appropriation for that year; and if it has not that many organized militia, its militia is not entitled to anything out of the appropriation for that year. Aside from this the number of organized militia makes no difference at all. The particular *amount* that they may receive does not depend on the number of militia, but on the number of senators and representatives their respective States are entitled to. None of this applies, however, to the militia of the Territories. So far as such militia is concerned the whole matter is left to the President. He can allot money for militia of the Territories before the militia is organized, or without its being organized. In fact the law simply is that there shall be given to the militia of the respective Territories "such portion" of the benefits of the appropriation "as the President may prescribe." And the portion to be prescribed by him in each case is not controlled by the number of inhabitants in

the Territory, or by the number of militia—organized or unorganized or anything else of that kind. Card 110, *August, 1894*.

1739. *Held*, that the status of Hawaii is that of a Territory of the United States within the meaning of the Militia Act of February 12, 1887 (24 Stats., 401), which provides that of the annual appropriation for the militia (act of June 6, 1900, 31 Stats., 662), such proportion thereof and under such regulations as the President may prescribe shall be apportioned to the Territories and District of Columbia. Card 9176, *October, 1900*.

1740. *Held* that sec. 4 of the act of February 12, 1887 (24 Stats., 402), was intended to provide a complete system for the disposition of unserviceable property issued to the militia, and that to add to the system thus prescribed an inspection by officers of the United States Army would be requiring something which the law did not intend should be required. Card 3787, *February, 1898*.

1741. Sec. 1 of the act of February 12, 1887 (24 Stats., 401), as amended and re-enacted by the act of June 6, 1900, authorizes an annual appropriation of one million dollars "for the purpose of providing arms, ordnance stores, quartermaster stores and camp equipage for issue to the militia." *Held* that cavalry sketching cases, emergency rations and hospital supplies, not being included in any of the classes of articles mentioned in this statute, could not be furnished from the appropriation provided. Card 8781, *August, 1900*.

1742. Members of the organized militia of a State, who have entered the volunteer army of the United States, and thus become U. S. soldiers, should not be included, while in such status, in the report made by the State of "its regularly enlisted organized and uniformed active militia" under the act of 1887 (24 Stats., 401). None should be reported under this act who are not at the time in the service of the State under such circumstances that they may be called out by it for actual duty. Card 5455, *December, 1898*.

1743. While the act of Congress of May 8th, 1792, provided that "every able-bodied male citizen of the respective States resident therein who is of the age of eighteen years and under the age of forty-five years shall be enrolled in the militia," it has been the practice since early in the century to treat the organized Territories as States in respect to this matter. Their governors have often been called on, the same as governors of States, to furnish militia for the United States service, which they have done. And when militia of Territories have been called by the President into the United States service they have been treated as "militia of the States" within the meaning of that term as used in the Constitution and statutes. So where, under

the call of the President in 1861, for seventy-five thousand militia, a requisition was made upon the governor of the Territory of New Mexico by the United States military commander of the district of New Mexico for a certain number of militia, and several organizations were furnished and mustered into the service of the United States in response to the requisition, it was *held* that the militia so mustered in were duly in the service of the United States. Cards 1031, 1071, *May* and *June, 1865*.

1744. Many militia organizations have been paid by the United States under acts of Congress which provided for the payment of such only of the militia as served in Indian wars in response to calls from the President. Where money so appropriated has been paid to a particular militia organization, a decision was probably made by some one at the time that the organization was in the service of the United States; otherwise the payment would not have been made. Such payment is a strong indication of what the understanding of the Government authorities was at the time. If it is the only evidence that can be found as to what that understanding was and the records of the organization show nothing either way on the main question, *i. e.*, whether the organization was in the service of the State or of the United States, it alone should be held sufficient to decide the matter. If, however, there is other evidence, the payment referred to should be considered with it in determining whether the organization was in fact in the service of the United States or of the State or Territory. These conclusions do not apply in the case of "volunteers" as the term is commonly used (see VOLUNTEERS), but care should be taken not to treat a militia organization as volunteers because it bore the name of volunteers at the time. Organizations have some times borne the name of volunteers when the facts and circumstances connected with their organization and service showed clearly that they were only State militia called into the service of the United States. Card 1377, *May, 1894*.

1745. Where it appeared that certain organizations of Alabama Territory militia of 1817-1818 were not formally mustered into the service of the United States but had in fact served in the Seminole war and had been mustered out of the service of the United States by officers of the regular army, being paid when mustered out by the United States from money appropriated in the army appropriation acts, and were fully recognized at the time, by both the territorial and national authorities as being in the military service of the United States, *held* that such recognition should at this time be deemed binding upon the United States. Card 232, *March, 1895*.

1746. State militia organizations may be made a part of the army of



the United States under that provision of the Constitution which provides for "calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion". These organizations are usually formed (either by volunteer engagement on the part of the men or by conscription by the State authorities) to serve the State, but the President can call them from the service of the State into the service of the United States, and sometimes these State organizations are formed, in the manner stated above, with the purpose in view of their transfer to the service of the United States (under a call of the President) as soon as formed. But under all these circumstances they retain their character of State militia and yet are at the same time (while in the active service of the United States under a call of the President) a part of the army of the United States. For general purposes they are considered as belonging to that branch of the United States army known as the "volunteer army", and this notwithstanding the men may have been conscripted and forced into the State militia organization by the State (to serve the State or to be transferred into the service of the United States) and then called into the service of the United States against their will and over their protest. Card 1301, *May, 1895*.

1747. The act of March 2, 1895, authorizes the Secretary of War to furnish to the governor of any State, at the expense of the State, a transcript of the history of any regiment or company "of his State." *Held* that this act applies to State troops organized, officered, etc., by the States to enter as volunteers into the service of the United States, and also to the organized militia of the States that were mustered into the service of the United States, but not to those organizations that were distinctively United States organizations and with which the States had nothing to do. The fact that the United States necessarily went into the States to recruit and raise the latter organizations does not make them regiments and companies of the State within the meaning of the act cited. Card 3894, *February, 1898*.

1748. There is no law of the United States which would prevent a State from arming its militia, out of an appropriation made by it, with any arm it may select. Card 2511, *August, 1896*.

1749. Under Secs. 1642, 5298, Rev. Sts., the President has the power to call the militia from one State into another to execute the laws of the Union, suppress insurrections, and repel invasions. Card 7574, *June, 1900*. But according to the weight of authority, he cannot constitutionally order militia "called into the service of the United States" out of the country to invade a foreign country.<sup>1</sup> Cards 3937, 4073, *March and April, 1898*.

<sup>1</sup> *Ordonaux* Constitutional Legislation 501; *Kneedler v. Lane*, 45 Penn., 238; *Martin v. Mott*, 12 Wheat., 19; *Houston v. Moore*, 5 id., 1.

MURDER.<sup>1</sup>

1750. The taking of the life of a prisoner of war, when not concerting an escape or engaging in any violence or breach of discipline justifying such an extreme measure, is as fully murder, as could be any homicide committed with deliberate malice in time of peace.<sup>2</sup> VII, 360, *March, 1864*.

## MUSTER-IN.

1751. The record of a formal muster-in is an official record, duly made by the proper officers pursuant to law, of an official act performed under the law. It is therefore, in the absence of fraud, conclusive evidence of the facts recorded, and no other evidence is admissible to show a different state of facts. Great uncertainty would ensue could such records be set aside by parol or other evidence. 60, 394, *July, 1893*.

1752. A muster-in is not necessarily formal. A mere enrolment is not a muster-in, and does not place the party in the military service. But taking up a man's name upon the rolls and accepting his services as a soldier is a constructive muster-in.<sup>3</sup> 41, 136, *June, 1890*; Card 186, *August, 1894*.

1753. In March, 1864, a company which had been enrolled as a company of Tennessee volunteer cavalry, having, under orders, rendezvoused at Fort Pillow, was given permission by the department commander to go to Memphis, Tenn., to be mustered into the United States service. But owing to the fact that Fort Pillow was threatened by the enemy, at that time, the company was ordered to remain and assist in its defence and was thus prevented from taking advantage of

<sup>1</sup>Murder, at common law, is "the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, with malice aforethought either express or implied." In many of the States, two or more degrees of murder are now distinguished by the statute law; murder in the first degree—generally defined as a killing accompanied by express malice, or a deliberate unlawful intent to cause the death of the particular person killed—being ordinarily alone made capital. Manslaughter, at common law, is distinguished from murder by the absence of malice aforethought. The State statutes have generally constituted degrees of manslaughter, also, a different measure of punishment being assigned to each degree. The laws of the United States, though prescribing different punishments for manslaughter under different circumstances, recognize no discriminations of grades in either manslaughter or murder. See Coke, *Inst.* 47; 4 Bl. Com. 95; 1 East, P. C. 214; 1 Russell, Cr. 482; 1 Gilbert, 454; 2 Wharton, Cr. L. § 560; 3 Greenl. Ev. § 130, Commonwealth v. Webster, 5 Cush. 304; G. O. 23, Dept. of California, 1865 (Remarks of Maj. Gen. McDowell). "Murder, originally," says Foster (p. 302, citing Bracton "*de homicidio*"), was "an insidious secret assassination; *occidit occidit, nullo regente aut vivente*." Now, secrecy in the commission of the act is significant only as evidence of legal malice.

<sup>2</sup>While it is lawful to kill an enemy "in the heat and exercise of war," yet "to kill such an enemy after he has laid down his arms, and especially when he is confined in person, is murder." State v. Gut, 13 Minn., 341.

<sup>3</sup>That it is not necessary to formally muster-in drafted men or their substitutes, see §§ 1229 and 1231, *ante*. As to commencement of service of volunteer officers, see opinion of Atty. Gen., dated Feb. 27, 1901.

the permission given it. A request was then made that a mustering officer be sent to Fort Pillow to muster in the company, but before one could arrive the fort was captured. Only a few of this company escaped death and they were taken away as prisoners of war. These survivors it appears were "changed" on the records to another company of another regiment of Tennessee cavalry, and there remained until final muster-out. *Held* that the foregoing facts constitute a striking instance of an actual entrance into the military service of the United States in the absence of and without a formal muster-in, and that the company should be viewed as having been regularly in such service at the time it was broken up. Card 1067, *April, 1895*.

1754. All the records of the company referred to in the preceding section were lost when Fort Pillow was captured. The captain who recruited the company made out a roll of it from memory in 1867. The persons whose names are borne on it or their heirs were paid on it at the time it was made out, and it has been used for some purposes in the War Department. In view of the fact that the roll was made by the person who enlisted the men and as a record of that enlistment, it should be accepted as *prima facie* evidence of the facts recorded therein, notwithstanding it was not made at the time of the enlistment. Whenever it is shown by other records made at the time of the occurrence of the things recorded that the roll is incorrect in any particular, it should be corrected accordingly. But as long as it is the only evidence obtainable, or the best evidence of a given fact, it may properly and legitimately be used to establish the fact. Card 1067, *April, 1895*.

#### MUSTER-OUT.

1755. The muster-out is a formal discharge from the army, making the soldier a civilian, and terminating all military authority and jurisdiction over him.<sup>1</sup> The fact that the United States may (as by Sec. 1290, Rev. Sts.) provide transportation to their homes and subsistence *en route* for soldiers after muster-out, does not continue them in the military service. Sec. 4701, Rev. Sts., defines the period of service of soldiers with reference to the application of the pension laws, but not otherwise. 65, 105, *May, 1894*.

1756. An officer or soldier actually serving to a given date cannot legally be mustered out or discharged as of a prior date. 44, 450, *January, 1891*; 46, 101, 223, 243, *March and April, 1891*; 51, 126, *December, 1891*; Card 8962, *September, 1900*. But where certain volunteer officers duly absent from their commands were on May 6,

<sup>1</sup>As to the effect of the concluding provision of the 60th Article of War, see note to § 117, *ante*.

1865, ordered by the President to be honorably mustered out of service "of date of 15th instant," the said officers to immediately apply by letter for their muster-out and discharge papers, *held* that they ceased, by virtue of that order, to be officers on the date last named, though the muster-out and discharge papers may not have reached them until after such date. Cards 1636, 1945, *October and December, 1895.*

1757. An officer of the volunteer branch of the army (act of April 22, 1898) can continue to hold his office after the regiment has been mustered out; this on the theory that he is not an officer of the regiment merely, but an officer of the volunteer branch of the army. His office can therefore be allowed to remain in existence and be allowed to hold it as long as that branch of the army is in existence. Card 5075, *September, 1898.*

1758. G. O. 108, A. G. O., of 1863, and circulars 75 and 80 of 1864, show that it was the policy of the Government at that time to discharge all volunteer officers and soldiers with their regiments, but many of them were in fact retained in service after their respective organizations were mustered out. The records show that the War Department has taken action and rendered decisions in many cases since the close of the war of the Rebellion based on the theory that it was legally possible for individual officers and soldiers to be retained in service after their regiments were mustered out. And from this practice and these decisions definite rules have been formulated and are now in force in the Record and Pension Office of the War Department. They were submitted by the Chief of that Office, approved by the Judge-Advocate General, and under date of February 16, 1897, duly adopted as rules of practice in such cases by the War Department, and are as follows:

1. As a general rule an officer or enlisted man of volunteers, who was not actually mustered out of service with his command, must be considered as having been retained in the military service of the United States, notwithstanding General Orders No. 108 of 1863, and other orders and circulars, of similar import, provided that he was retained in service, or military control was exercised over him, by competent authority. There are exceptions to this rule, however, such as those noted in paragraph seven, following.

2. When an officer or soldier was so retained in service, or subjected to military control, by the order or authority of a superior whom it was his duty to respect and obey while in service and who would have had authority to issue such order or exercise such control while the subordinate officer or enlisted man was in service, he must be considered to have been retained in service by competent authority.

3. An officer or enlisted man so retained in service, or subjected to



military control, must be considered to have been in service so long as he was actually so retained or subjected to control.

4. An officer who, having been retained in service after his command had been mustered out, was ordered by the Adjutant General, or by other competent authority, to proceed to his home and report by letter to the Adjutant General for discharge, must be considered to have been in service until he received the order for his discharge, or, in case it cannot be ascertained when he received notice of his discharge, until the date of the order directing his discharge, provided that it appears that upon receiving the order to go to his home and report he obeyed the order without delay.

5. An officer or enlisted man who was retained in service after the muster-out of his command, and was subsequently ordered to report to the chief mustering officer of his State for discharge, must be considered to have been in service until the date of the issue of that discharge, provided that it appears that he obeyed his order and reported to the chief mustering officer of his State without delay.

6. But either an officer or an enlisted man, retained in service or subjected to military control after the muster-out of his command, who voluntarily withdrew himself from such service or control without permission from the proper authority, or who failed to promptly obey an order to proceed to his home and report to the Adjutant-General, or an order to report to the chief mustering officer of his State, must be considered to have been separated from the service on the date on which he withdrew himself from military control or was relieved from duty; and if that date is not ascertainable, then his service must be considered to have terminated on the date of the last official order issued, or the last official act done to or concerning him, while he was still actually rendering military service or was under actual military control.

7. It is to be understood that the foregoing propositions apply only to officers and enlisted men who were retained for the service or convenience of the Government, or by reason of the refusal or neglect of superior officers to cause them to be discharged; and that these propositions do not apply to deserters at large or to absentees with or without leave, at the date of muster-out of their commands, or to any persons who, through fault or neglect of their own, failed to be mustered out or discharged at the proper time, or to those who were *permitted* to remain under partial military control solely for their own comfort, convenience or safety, such as sick or wounded men undergoing treatment in hospital or elsewhere.

And recently in section 15 of the "Instructions for Muster-out of the Service of United States Volunteers" (G. O. 124. A. G. O., 1898),

provision is made for "such as may be held in service by proper authority" after their organizations shall have been mustered out. Card 5075, *September, 1898*.

1759. On January 12, 1899, it was provided by statute (see G. O. 13, A. G. O., 1899) "that the discharge of all officers and enlisted men from the volunteer service of the United States shall, as far as practicable, take effect on the date of the muster-out of the organization to which they belong." Among the instructions or regulations of the Secretary of War for carrying out this law is the following: "As provided for by law, all officers and enlisted men, present and absent, stand discharged on the date of the muster-out of the organization to which they belong, unless retained in service by special authority of the War Department." *Held* that this regulation properly assumes that the Secretary of War has authority to retain officers and enlisted men in the service, because when "special authority of the War Department" is given for such retention, it has been duly decided that it was not "practicable," within the meaning of the statute referred to, for them to go out with their organizations. Card 6621, *July, 1899*.

1760. Paragraph 1 of General Orders 108, A. G. O., 1863, prescribed that whenever volunteer troops were mustered out of service the entire regiment or other organization would be considered as mustered out at one time and place, with the exception of prisoners of war. This order must be regarded as promulgated by authority of the President because it was issued by the Secretary of War. That the order was such a regulation with reference to the administration of the army as the President had constitutional authority to make cannot be questioned, and being such it had the force of law where it applied. No one subject to the constitutional authority from which the order emanated could claim exemption from it on the ground of any absence of personal notice. The making known of this regulation throughout the army was notice to all concerned, and thereafter they held their enlistment subject to its conditions. When a man enlists in the army he does not bind himself to obey only the regulations and orders in force at the time of his enlistment, but he agrees to obey the orders of the President without any such limitation, and he thereby enters into a new status and subjects himself to a new code and all the changes that may be made in it from time to time. General Order No. 108, of 1863, when it was issued and made known to the army, became a part of this code to which the soldier had subjected himself and he had no right to any further notice of discharge; and by the established practice of the service the making known of the regulation to the army was the only notice required. It has been held that this regulation did not apply to soldiers specially retained in the service by compe-

tent authority, because in such case the exception emanated contemporaneously from the same authority that made the rule.

There is another point of view from which this subject might be considered were it necessary to do so. The power of an immediate disbandment of the whole army must be vested somewhere in our political system. This power is of course primarily vested in Congress, which may pass an act, operative at the date of its passage, abolishing the army on that date. But as Congress cannot know precisely when volunteer troops may no longer be needed and may be disbanded, it has been left to the Executive to declare when they shall go out of service, and this executive power, when there is no legislative restriction, would seem to be as plenary as the legislative power. Therefore, the Executive, in disbanding a volunteer army (when the disbandment has been left to the Executive by Congress), might cause it, or parts of it to go out of existence summarily, without any notice, actual or constructive. The exercise of this power to this extent would manifestly cause great hardship, and it has not been attempted in practice. But the existence of the power has an evident bearing on the subject of notice, because where the power exists no original right of notice exists, and such right of notice as springs up is purely a concession to fairness.

Paragraph 15 of G. O. 124, A. G. O., of 1898, prescribed that "the discharge from the United States volunteer service in case of all absentees (except in special cases otherwise provided for or such as may be held in service by proper authority) will take effect on the date of the muster-out of the organization." Par. 1, sec. II, of the same order directed that a physical examination should be made "of all officers and enlisted men of volunteers, except general officers and officers of the general staff, immediately prior to their muster-out of service or discharge." This apparently included absentees under military control who (considering this provision without reference to others) might well be considered in the service for the purpose of this examination until discharged, either with or without examination. But by paragraph 14 of the order it was prescribed that on the muster-out of an organization, discharge certificates were to be prepared for every officer and man, present and absent, except officers and men held in service by proper authority and deserters; and paragraph 17 directed that in the cases of enlisted men absent, who on account of sickness were unable to join their commands, the discharge certificates were to be given to the mustering officer for transmission to the Adjutant General, and in the case of soldiers absent on detached service under proper authority descriptive lists were to be sent to the officers under whom they were serving. Here is proof of an intention to carry out the pro-

visions of paragraph 15 according to its terms. Paragraphs 14 and 17 merely supplied the means of doing so. All the parts of an executive regulation like a statute must be considered together to arrive at its true meaning, and moreover the construction here indicated has obtained in practice. *Held* therefore that G. O. 124 of 1898 had the same effect as G. O. 108 of 1863; that is, to discharge all absentees not retained in service by competent authority on the date of the muster-out of the organizations to which they belonged.<sup>1</sup> Cards 6980, 8962, *September, 1900.*

1761. Where a muster-out roll dated December 23, 1864, showed "the company mustered out on that date, \* \* \* to date from November 30, 1864," *held* that the actual date of muster-out was as stated on the record, December 23, 1864. Card 2888, *January, 1897.*

1762. When it is clearly shown by the official records that a volunteer organization was actually mustered out of the military service of the United States on a certain date, that date should be held and accepted as the true date of muster-out, regardless of the date which may have been fixed in advance for the muster-out, of the date to which payment was made, and of the date of discharge entered upon the discharge certificates of the men mustered out with the organization. This rule should not, however, apply to the case, if such a case should arise, of an organization mustered out on a certain date as of some future date, payment being made to the future date and the discharge certificates bearing that date. Card 7451, *December, 1899.* Thus where the records showed that a volunteer organization, having been furloughed to November 11, 1898, was ordered to be mustered out on November 21st, but was finally mustered on November 16th, payment being made to November 21, 1898, and the discharge certificates bearing the latter date, *held* that the true date of muster-out was November 21, 1898, the muster-out having taken effect on that date. Card 8722, *August, 1900.*

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## N.

### NATIONAL CEMETERY.

1763. The appraisement of land for a national cemetery, as duly made by a United States court under Secs. 4871 and 4872, Rev. Sts., is conclusive upon the Secretary of War, who must thereupon pay the

<sup>1</sup>See this opinion approved by the War Department and published in full in a circular therefrom, dated September 20, 1900.



appraised value as indicated in the latter section. If indeed there has been *fraud* in the valuation by which the court has been deceived in its decree, or its original appraisement is deemed *erroneous*, it may properly be moved for a new appraisement on the part of the United States.<sup>1</sup> XXVI, 617, *June, 1868*.

1764. *Held* that, notwithstanding the provision in Sec. 4872, Rev. Sts., that the jurisdiction of the United States over land taken for a national cemetery, by the right of eminent domain, "shall be exclusive,"—such a jurisdiction, where the land is within a State, cannot be legally vested in the United States, except by the cession of the State legislature. In the absence of such cession on the part of the State sovereignty, an act of Congress must be powerless to confer such an authority.<sup>2</sup> XXVII, 661, *May, 1869*.

1765. *Held* that the general annual appropriation for the maintaining of the national cemeteries could not legally be expended for the purchase of other land, even if such land was proposed to be used for the interment of soldiers; but that for such a purchase, as for any purchase of land by the United States, specific authority must be obtained from Congress. XLI, 50, *November, 1877*.

1766. By Sec. 4881, Rev. Sts., the superintendent of a national cemetery is authorized to arrest persons who injure, &c., grave-stones, trees, shrubs, &c., within the cemetery. *Held* that he could not, under this authority, legally arrest a person who fired a gun into or across the cemetery without causing any such injury as is specified in the statute, but, for the arrest and punishment of such a trespasser, must have recourse to the local authorities. XXXII, 425, *March, 1872*.

1767. Superintendents of national cemeteries are no part of the army but civilians, being required indeed by Sec. 4874, Rev. Sts., to be selected from persons who have been honorably discharged from the military service. They are therefore of course not subject to the Articles of War or to trial by court martial;<sup>3</sup> and, for any serious misconduct on the part of a superintendent, a removal from office would be the only adequate remedy. XXXV, 34, *October, 1873*; XXXVIII, 381, *November, 1876*; 577, *April, 1877*.

1768. Secs. 4870-4872, Rev. Sts., constitute the only existing general law authorizing the purchase or acquisition of land as cemetery grounds for the interment of soldiers. The general provision on the subject, of sec. 18 of the act of July 17, 1862, c. 200, has ceased to be

<sup>1</sup> See 14 Opins. At. Gen., 27.

<sup>2</sup> See the subsequent opinion of the Atty. Gen., in 13 Opins., 131.

<sup>3</sup> See the subsequent opinion, concurring in this view, of the Attorney General, in 16 Opins. 13. And see § 168, *ante*.

in force under the operation of Sec. 5596 of the repealing provisions of the Revised Statutes. 32, 261, *May, 1889.*

1769. To authorize the acquisition, by the exercise of the right of eminent domain, of private land for a national cemetery under Secs. 4870, 4871, Rev. Sts., there must be—(1) an existing appropriation (in conformity with the rule of Sec. 3736, Rev. Sts.), authorizing the acquisition; and (2) the private owner must be unwilling to give title, or the Secretary of War be unable to agree with him as to price. 32, 277, *May, 1889.*

1770. The Government is under no legal obligation to provide burial places for destitute soldiers at a volunteer home. Sec. 4878, Rev. Sts., in providing that the soldiers, &c., there designated, "may be buried in any national cemetery free of cost," does not require the establishment of a national cemetery specially for the purpose of interments at such a home. 32, 277, *May, 1889.*

1771. The Gettysburg National Cemetery was established in 1863 by the State of Pennsylvania with the cooperation of seventeen other States whose soldiers were engaged in the battle of Gettysburg; and a corporation was created for its establishment and care by an act of the Pennsylvania legislature. The act of incorporation provided, among other things, that "the said grounds shall be devoted in perpetuity to the purpose for which they were purchased, namely, for the burial and place of final rest of the remains of the soldiers who fell in the defence of the union in the battle of Gettysburg; and also the remains of the soldiers who fell at other points north of the Potomac river in the several encounters with the enemy during the invasion of Lee, in the summer of one thousand eight hundred and sixty three, or died thereafter in consequence of wounds received in said battle and during said invasion." By an act of the Pennsylvania General Assembly of April 14, 1868, the commissioners having charge of the cemetery were authorized to transfer all the right, title, interest and care of the same upon its completion to the United States upon condition "that the United States government take upon itself the management and care of said cemetery and make provision for its maintenance." In accordance with a resolution of Congress approved July 14, 1870, a deed from the Soldiers' National Cemetery (the corporation above referred to) dated April 18, 1872, was accepted, which deed granted to the United States the cemetery to have and to hold "for the purposes for which it was acquired \* \* \* as is fully set forth in the act of incorporation \* \* \*"; but it is not stated that it shall not be applied to other like cemetery purposes also.<sup>1</sup> Held therefore that

<sup>1</sup> See leading cases in the American Law of Real Property, pp. 24-27.

the burial of the persons specified in Section 4878, Revised Statutes, may be made in this cemetery without violating the terms of the transfer. Card 5246. *November, 1898.*

1772. Section 3 of the act of incorporation establishing the "Soldiers' National Cemetery" at Gettysburg, gave to the board of commissioners authority to lay out, fence and ornament the grounds, to erect buildings and monuments and generally to do whatever in their judgment should be deemed necessary and proper to adapt the grounds and premises to the uses for which they had been purchased and set apart. In view of the circumstances and conditions of the transfer of this cemetery to the United States government (see preceding section) and the laws of Congress relating to national cemeteries, *held* that it was within the discretion of the Secretary of War to permit the erection, in said cemetery, by the agents of a State, of a monument to the dead of that State buried in the cemetery. 33, 42, *June, 1889.*

## NAVIGATION.

1773. The United States is not the owner of the soil of the beds of navigable waters,<sup>1</sup> nor of the shores of tide-waters below high-water mark, nor of the shores of waters not affected by the tide below the ordinary water line of the same, except as it may have become grantee of such soil from the State or from individuals. The property in and over the beds and shores of navigable waters is in general in the State, or in the individual riparian owner.<sup>2</sup> But under the power to regulate commerce, Congress may assume, as it has recently assumed (see § 613, *ante*) the power so to regulate navigation over navigable waters within the States as to prohibit its obstruction and to cause the removal of obstructions thereto, and such power when exercised is "conclusive of any right to the contrary asserted under State authority."<sup>3</sup> In exercising this power, it cannot divest rights of title or occupation in a State or individuals, but these rights are left to be enjoyed as before, subject, however, to the paramount public right of

<sup>1</sup> See the definition of the term, "navigable waters of the United States", in *The Daniel Ball*, 10 Wallace, 557; *Ex parte Boyer*, 109 U. S. 629. See also *Chesole v. Cumes*, 67 Fed. Rep. 285; *St. Anthony Falls Water Power Co. v. Water Commissioners*, 168 U. S. 349; *Leovy v. U. S.*, 177 *id.* 621. Statutes passed by the States for their own uses, declaring small streams navigable, do not make them so within the Constitution and laws of the U. S. *Duluth Lumber Co. v. St. Louis Boom & Improvement Co.*, 17 Fed. Rep., 419. And see § 1777, *post*.

<sup>2</sup> *Pollard v. Hagan*, 3 Howard, 212; *Barney v. Keokuk*, 94 U. S. 337; *Gilman v. Phalad*, 3 Wallace, 713; *South Carolina v. Georgia*, 93 U. S. 4; 6 Opins. At. Gen. 172; 7 *id.* 314; 16 *id.* 479; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 367; *Shively v. Bowlby*, 152 *id.* 1; *Scranton v. Wheeler*, 57 Fed. Rep., 803; *Scranton v. Wheeler*, 179 U. S., 141.

<sup>3</sup> *Wisconsin v. Duluth*, 96 U. S. 379; *U. S. v. City of Moline*, 82 Fed. Rep., 592; *Leovy v. U. S.*, 92 *id.* 344; *Leovy v. U. S.*, 177 U. S. 621.

freeing navigation from obstruction possessed and exercised by the United States through Congress. In the execution of the laws relating to obstructions to navigation the Secretary of War has no general authority, but only such as may have been vested in him by legislation of Congress, especially in the river and harbor appropriation acts.<sup>1</sup> 15, 272, 16, 244, *March and April, 1887*; 31, 42, *B*, 386, 35, 234, *April to September, 1889*; 42, 85, *July, 1890*; 51, 196, 55, 140, 56, 483, *January to December, 1892*; 58, 450, *March, 1893*; 63, 365, *February, 1894*; Card 2138, *March, 1896*.

1774. By legislation prior to 1890, Congress had exercised some control over the subject of obstructions to navigation, principally with reference to bridges over navigable streams. (§ 613, *ante*.) But by the River and Harbor Appropriation Act of September 19, 1890, a general authority over the subject was assumed,<sup>2</sup> and it was enacted, in sec. 10, as follows: "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of *any waters*, in respect of which the United States has jurisdiction is hereby prohibited." The act does not make it the duty of the Secretary of War to enforce this provision in all cases, but, in secs. 4, 6, 7, 8 and 12, it invests him with specific authority with regard to certain kinds of obstructions, as—to take precautions against obstruction by bridges and to approve the location of bridges, &c.; to give permits for making deposits of substances or materials in navigable waters; to permit the erection of wharves, dams, breakwaters and the like; to break up and remove wrecks, &c.; and to cause the establishing of harbor lines under regulations prescribed by him. But the prosecution and punishment of individuals creating obstructions without proper permit or authority of law is left by the act to the law officers and the courts. 63, 365, *February, 1894*.

1775. There is no law authorizing the Secretary of War to cause obstructions to be removed from navigable waters, except as he may direct his subordinates, charged with river or harbor improvement, &c., to remove them where appropriations exist for the purpose. The act of September 19, 1890, c. 907, makes it unlawful to place obstructions in navigable waters without the permission of the Secretary of War, but when the law is violated it is not for the Secretary to initiate proceedings but for the legal and judicial authorities under secs. 10 and 11 of the act, to take action by prosecution and injunction. 52, 343, *March, 1892*; 63, 365, *February, 1894*.

1776. Under the provisions of sec. 10 of the act of September 19,

<sup>1</sup>See the subsequent opinion of the Attorney General in 20 Opus. 101.

<sup>2</sup>See sections 9 to 20, inclusive, of the River and Harbor Act of March 3, 1899 (30 Stats., 1151), for existing statutes on the subject.



1890, it becomes not only unlawful but a criminal act to obstruct the navigation of navigable waters of the United States. Thus where a railroad company, under color of authority from certain State officials, proceeded to close for a month, pending the repairing of one of its bridges, the passage up and down an interstate navigable stream, so that in fact the United States was prevented from transporting upon the same a gun carriage manufactured within the State for the Government—*held* that the assumption of jurisdiction over such waters by the United States through the legislation of Congress had displaced the jurisdiction previously exercised by the State to authorize such obstructions; and that under this legislation the river was a public highway, open, not only to the United States for public purposes, but to all private individuals whatsoever, and could not lawfully be closed or interrupted; and *advised* that the proper U. S. district attorney be communicated with, with a view to the initiation of proceedings under sec. 11 of the act. 64, 210, *March, 1894.*

1777. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary mode in which such commerce is conducted by water.<sup>1</sup> The true test of the navigability of a stream does not depend on the mode by which commerce is or may be conducted, nor the difficulties attending navigation. It would be a narrow rule to hold that in this country unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent or manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway.<sup>2</sup> Applying these tests to a tributary of the Mississippi River in Tennessee, it was *held* that the same was a navigable water of the United States; that the fact that all acts of the State legislature declaring a certain part of the river navigable had been repealed, did not affect

<sup>1</sup>The *Daniel Ball*, 10 Wall., 557.

<sup>2</sup>The *Montello*, 20 Wall., 430.

the question of the navigability of that part so far as the laws of the United States were concerned. For example, the duty of the Secretary of War, under sec. 4, act of 1890, with respect to unreasonable obstructions to navigation over the part referred to, would be unaffected by the repeal of the State laws. Cards 1511, *July, 1897*; 1709, *September, 1895*.

1778. *Held* that the Bayonne Canal, in Hudson Co., New Jersey, was navigable water of the United States subject to the admiralty jurisdiction of the U. S. district court and to the laws of Congress for the enrolment and licensing of vessels and otherwise regulating of commerce, and could not therefore legally be obstructed by filling up or damming, by a railroad company, without the permission of the Secretary of War under the act of September 19, 1890. 44, 152, *December, 1890*.

1779. *Held* that the building of a dyke, under an appropriation for the improvement of the navigation of the Hudson River, did not of itself vest in the United States a property in the soil or give it any title thereto;<sup>1</sup> that the property in the river frontage was affected by the rights of the United States only so far as concerned the navigation of the river and the maintenance and conservation of the work of improvement, and that the owner might legally make any use of his property that he might see fit provided it did not obstruct navigation or interfere with the improvement.<sup>2</sup> LI, 609, *March, 1887*. And see 54, 477, *August, 1892*.

1780. Under the power to improve navigation, Congress may appropriate for, and the Secretary of War may cause to be erected, a pier in Lake Michigan, and after its erection the United States has the authority of *conservation* of the same. 54, 477, *August, 1892*. And see LI, 609, *March, 1887*. Its exercise may be discontinued or abandoned when the work—such as a pier, dam, breakwater, &c.—is no longer needed for the improvement of navigation. 32, 375, *May, 1889*; 39, 99, 42, 210, *February and July, 1890*.

1781. *Held*, that under the acts appropriating money for the improvement of the Columbia River, to be expended under the direction of the Secretary of War, the Secretary, while authorized to make regulations for the prosecution and protection of the works of improvement, was not empowered to require, by such regulations, the removal of fish-traps and pound nets as obstructions to navigation; that it was not within the province of the Secretary of War to determine what is or what may become an obstruction to navigation, and cause to be removed

<sup>1</sup> 6 Opins. At Gen., 172; 7 *id.*, 314; Hawkins Point Lighthouse Case, 39 Fed. Rep., 77; *Seranton v. Wheeler*, 179 U. S., 141.

<sup>2</sup> 10 Opins. At Gen., 486. See, however, act of Congress of March 3, 1899 (30 Stats., 1152), and *Seranton v. Wheeler*, *supra*.

the one or prohibited the other by a mere order or regulation, in the absence of authority given by specific legislation of Congress. 1411, 257, *April, 1887*.

1782. *Held*, under sec. 12 of the act of September 19, 1890, authorizing the Secretary of War to establish harbor lines, that, in establishing a harbor line in the harbor of Bridgeport, Conn., he was authorized to prescribe regulations under which the littoral owners (who, by the laws of Connecticut, have a right of property in the flats on their fronts, and may wharf or dock out to the navigable channel so as to avail themselves of the use of it) should have their vested rights recognized and protected; that while he might, for the protection of navigation, regulate their building out to the channel, he could not prohibit their doing so, or condemn, or deprive them of, their property. But *held* that his authority for establishing a harbor line — which consists in locating an imaginary line beyond which wharves, &c., shall not be extended or deposits dumped — could be exercised only so far as necessary for the protection of the navigable channel as an interstate waterway, and not to protect mere local traffic. 52, 211, *February, 1892*. And see 51, 132, *December, 1891*.

1783. The construction, without the authority of the Secretary of War, of *weirs* in a harbor which is navigable water of the United States, outside of established harbor lines (or where there are no harbor lines established), is, under sec. 7, act of September 19, 1890, unlawful when the same will be detrimental to navigation. And whether or not the persons who constructed such weirs had any license from the town is immaterial. 53, 45, *April, 1892*.

1784. A fish weir, so constructed as in a measure to obstruct the navigation of navigable waters, can not legally be placed in such waters without the authority of the Secretary of War, who, by sec. 7, act of September 19, 1890, is empowered to grant permission for the purpose. And so of a boom desired to be placed in a navigable river. 58, 347, *March, 1893*.

1785. Section 10 of the River and Harbor Act of March 3, 1899, makes it unlawful to construct docks and wharves in any navigable water of the United States without the permission of the War Department. The object of the law is to protect the interests of navigation by requiring all projects for the erection of such structures to be considered and passed upon by the Department. A permit granted by the Secretary of War for the erection of a dock or wharf confers on the grantee no right, authority, or usufructuary interest in and to the shore or bed of the stream where the dock is to be built. The Federal statute simply makes the consent or permission of the War Department a

condition precedent to the exercise of such right, wherever its exercise is liable to affect commerce and navigation; and when granted the permission can in no sense be construed as vesting in the grantee any power to avoid or contravene the State and local laws or to invade the privileges and immunities held by other parties thereunder. (Card 8360, *June, 1900*).

**1786.** The Erie and Atlantic Basins, in New York Harbor, are private property, but they are also navigable waters of the United States; and the owners of the soil under the water hold the title subject to the rights of the public to navigate such waters, and are therefore not empowered to fill in the basins and deprive the public of their use. Moreover they are waters over which the United States has expressly assumed jurisdiction in prohibiting, by the act of June 29, 1888, the dumping of deposits "in the tidal waters of the harbor of New York, or its adjacent or tributary waters, within the limits which shall be prescribed by the supervisor of the harbor." *Held* that the subsequent establishment, under the act of August 11, 1888, s. 12, of harbor lines in that harbor outside these basins did not oust this jurisdiction, but that the act of June 29, 1888, was still in force. 50, 366, *November, 1891*.

**1787.** *Held* that the prohibition, by sec. 6, act of September 19, 1890, of the dumping of ballast could not legally be enforced in New York Harbor beyond the three mile limit.<sup>1</sup> 51, 154, *December, 1891*.

**1788.** *Held* that the River and Harbor Act of August 11, 1888, s. 12, did not make the approval of the Secretary of War essential to the establishment by a State of harbor lines on its internal navigable waters, and therefore that, until the United States exercises control in the manner provided for by sec. 12 of said act, the State of Wisconsin was empowered, through the municipality of Duluth, to change and regulate the harbor lines of Duluth harbor without such approval.<sup>2</sup> 33, 308, *July, 1889*.

**1789.** The River and Harbor Act of June 14, 1880, s. 4, makes it the duty of the Secretary of War, on being satisfied that a *sunken vessel* obstructs navigation, to give thirty days' notice, to all persons interested in the vessel or cargo, of his purpose to cause the same to be removed unless removed by the persons interested as soon thereafter as practicable, before himself proceeding to take measures for its removal under the act. If the removal be effected by the Secretary of War, the act requires that the vessel and cargo shall be sold at auction and the proceeds deposited in the Treasury. Under this legis-

<sup>1</sup> Compare the concurring opinion of the Attorney General, in 20 Opns., 293.

<sup>2</sup> See *County of Mobile v. Kimball*, 102, U. S. 691.



lation—especially in view of the fact that the act authorizes the taking possession of the property of private individuals and the disposing of it without compensation to the owners—*held* that the notice should be strictly given to all interested, the owners of the cargo as well as the vessel, unless indeed such notice were waived, in which case the waiver should be definite and express and joined in by all the interested parties. 35, 406, *October, 1889*.

1790. The engineer officers of the army, in opening a channel in a navigable river, for the improvement of which appropriation had been made by Congress, were assisted and co-operated with by a local transportation company which owned the land adjoining the channel which it was using for its own boats. Upon the completion of the improvement this company proceeded to levy a toll on other vessels passing through the channel. *Held* that such toll was an obstruction to navigation and could not legally be enforced; the fact that the company owned the land giving it no exclusive right to the free use of navigable waters of the United States. L. 538, *July, 1886*.

1791. Where a railroad company, which, as riparian proprietor, owned the land upon which was located a revetment of the bank of a navigable stream (constructed by the United States in the improvement of the navigation of the same), was authorized to rebuild the revetment, subject to the condition that the work should be so done and maintained as to fully subserve its purpose as a safe and secure revetment and protection to the channel of the stream—*held* that the company, as riparian owner, was legally entitled to use the revetment so long as such use did not impair its serviceableness or involve such an exclusive possession as would be in violation of the provisions of sec. 9 of the act of September 19, 1890; and that a failure on its part to perform the condition would not, *per se*, divest it of such right of use, or empower the Secretary of War to enforce such performance by revoking the authority to rebuild the revetment. 64, 11, *February, 1894*.

1792. *Held* that under sec. 3 of the River and Harbor Appropriation Act of July 13, 1892, the Secretary of War was empowered to authorize the laying of a water main across the bed of the channel of any navigable water of the United States. 65, 352, *June, 1894*.

1793. *Held* that it was doubtful whether "floatable" streams, *i. e.*, streams capable only of being used for floating saw-logs, timber, &c., not being navigable in a general sense, were included in the term "navigable waters of the United States," as employed in statutes providing that dams shall not be constructed in such waters without the permission of the Secretary of War. But *held* that it was clearly

competent for Congress, under the commerce clause of the Constitution, to exercise control over such streams as highways of interstate commerce. 63, 375, *February, 1894*.

1794. The act of August 17, 1894 (sec. 6), provides that "it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, \* \* \* or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War". And any and every such act is made a misdemeanor punishable by fine and imprisonment, etc. This statute prohibits the discharging or depositing of matter "in the waters of any harbor or river for the improvement of which money has been appropriated by Congress." As the statute is a penal one, and therefore subject to the rule of strict construction, this prohibition should not be construed to extend to the tributaries of such waters, notwithstanding the pollution of the tributaries would result in injury to said waters. Card 581, *October, 1894*.

1795. No executive department of the Government can give private parties the exclusive privilege of harvesting ice from any part of a navigable river of the United States. Card 1817, *November, 1895*.

#### NEW TRIAL.

1796. New or second trials have been of the rarest occurrence in our military service. They have only been had, and are only authorized, where the sentence adjudged upon the first trial has been *disapproved* by the reviewing authority and the accused has *asked for* a second trial. It was held at an early period by Attorney General Wirt<sup>1</sup> that the prohibitory provision of the Articles of War (now contained in Art. 102) that "no person shall be tried a second time for the same offence," did not apply to a case in which the accused himself requested a new trial, the objection to such trial being deemed to be subject to be *waived* by the consent and action of the party tried. The privilege of applying for and being allowed a re-trial — for it is not a right, since the trial may be granted or denied at the discretion of the proper superior — has naturally been but seldom exercised; parties convicted and sentenced being in general satisfied that the proceedings in their cases should be terminated by the disapproval, on whatever grounds the same may be based. The principal instances of new trials in our practice are — that of Captain Hall (in whose case Mr. Wirt's opinion

<sup>1</sup> 1 Opins. At. Gen. 233. And see 6 *id.* 205.

was given), and those of which the proceedings are published in G. O. 1<sup>st</sup>, War Dept., 1861, and G. O. 8, 9, and 26, First Mil. Dist., 1869. After a sentence has been duly approved and has taken effect, the granting of a new trial is of course beyond the power of a military commander or the President. XXXVII, 492, *April, 1876*; XXXIX, 233, *October, 1877*; XLIII, 423, XLIV, 171, *October, 1880*.

#### NOLLE PROSEQUI.

1797. A prosecution before a court martial proceeds in the name and by the authority of the Government. (See Art. 90.) The United States, therefore, through the Secretary of War, or the military commander who has convened the court, may require or authorize the judge advocate to enter a *nolle prosequi* in a case on trial (or, less technically, withdraw or discontinue the prosecution), either as to all the charges where there are several, or as to any particular charge or specification. But the judge advocate cannot exercise this authority at his own discretion, nor can the court direct it to be exercised. IX, 485, 533, *August, 1864*; LIV, 458, *November, 1887*.

#### NON-COMMISSIONED OFFICER.

1798. Where a non-commissioned officer (sergeant) was transferred to another company as a private, but shortly thereafter was again appointed a non-commissioned officer: *held* that, having actually served for a time as a private, his service as such could not legally be converted into that of a non-commissioned officer by dating his warrant back to the date of his transfer. Card 4427, *June, 1898*.

### O.

#### OATH—AUTHORITY TO ADMINISTER.<sup>1</sup>

1799. An officer of the army has no authority, *virtute officii*, to administer an oath. He is indeed specially empowered to exercise this function, under certain circumstances, by statute—as by the 2d, 84th and

<sup>1</sup>By sec. 4 of the act of July 27, 1892 (27 Stats., 278), "judge-advocates of departments and of courts-martial, and the trial officer of summary courts are . . . authorized to administer oaths for the purposes of the administration of military justice, and for other purposes of military administration."

Under sec. 19 of the act of May 28, 1890 (29 Stats., 184), United States commissioners and all clerks of United States courts are authorized to administer oaths generally (3 Comp. Dec., 65).

85th Articles of War; and further by sec. 183, Rev. Sts., in a case where, being an officer of the War Department, he is detailed to investigate frauds, &c.<sup>1</sup> XXXIV, 648, *December, 1873*.

1800. Par. 771, A. R., authorizing certain military officers to administer certain oaths, *held* without legal effect. Such authority can be given only by statute. 56, 88, *October, 1892*. The regulation is an encroachment upon the legislative province. 80, 471, *July, 1893*; 85, 187, *June, 1894*. The affidavits referred to in this paragraph (which are such only as relate to matters of property accountability—XIX, 244, 333, 355, *July and September, 1885*) should be taken, if practicable, before one of the military officers authorized to administer oaths by the act of July 27, 1892, c. 272, s. 4. If no such officer is available, a competent civil official should be resorted to.<sup>2</sup> 80, 471, *supra*.

1801. The act of July 27, 1892, c. 272, s. 4, in authorizing certain military officers to administer certain oaths, does not, of course, affect the power, of administering such oaths, of other officials who may have been authorized to administer them before the passage of the act. Such officials may still administer the same, and, when doing so, should be paid their fees as notaries, commissioners, &c., as before. But, to avoid expense, it is desirable to resort to the officers empowered by the statute, where practicable. 56, 408, *November, 1892*.

1802. Affidavits required to be taken in the execution of contracts pertaining to military administration may be taken before the officers named in the act of July 27, 1892. This act having been passed subsequent to the enactment of Section 3745, Revised Statutes, modifies the latter to the extent stated. Cards 3671, *November, 1897*; 3768, *January, 1898*.

1803. The term "judge-advocates of departments" used in the act of July 27, 1892, was intended as descriptive of the officers performing the duties of those positions, and includes the officers detailed under the act of July 5, 1884, to perform such duties as well as the officers of the Judge-Advocate General's Department who are performing them, and also officers temporarily assigned to such duty by a department commander. In fact there is no officer of the army whose title, aside from his assignment to such duties, is "judge-advocate of department." The judge-advocate of a department and the other officers named in the act of July 27, 1892, as well, should, in taking

<sup>1</sup>Sec. 183, Rev. Sts., was amended March 2, 1901, to read as follows: "Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation."

<sup>2</sup>See G. O. 20, of June 22, 1894, abrogating the old par. 771, A. R., and substituting a new one in conformity with the view here expressed, 683 of 1895 [765 of 1901].



affidavits, append to their signatures such words as will show that they are competent to administer such oaths. Cards 3746, *December, 1897*; 9060, *October, 1900*.

## OATH—OF OFFICE.

1804. The act of July 2, 1862, now contained in Sec. 1756, Rev. Sts.,<sup>1</sup> requires that "every person elected or appointed to any office of honor or profit, either in the civil, military or naval service" (with certain exceptions stated), shall, before entering upon the duties of such office, take and subscribe a certain form of oath recited in the enactment. *Held* that the term "office" referred to a public office established by law with a definite tenure, function, &c., and therefore that an *agent* employed by the Secretary of War, under his general authority, and for a temporary purpose, and whose duties, &c., were not defined by any statute, was not an incumbent of an *office* in the sense of the statute or required to take the prescribed oath.<sup>2</sup> XXVI, 652, *July, 1868*.

1805. *Held* that a "private physician," temporarily employed to attend officers or soldiers under the authority of the Army Regulations, was not an officer of the United States, or required to take the oath prescribed by the act of July 2, 1862 (Sec. 1756, Rev. Sts.). XXVIII, 22, *July, 1868*; XXX, 437, *June, 1870*.

1806. *Held* that an officer of the army, in entering upon his office, could not be allowed (in the absence of special authority from Congress) to take a modified oath of office on the ground that his religious convictions would not permit him to take the oath as prescribed in the statute. XI, 503, *February, 1865*.

1807. *Held* that a person who, having given aid to the enemy during the war of the rebellion, had, upon his disability being removed by Congress, been appointed to an office under the United States, could not legally qualify himself for the same by taking a form of oath of office prepared by himself, but could take only the modified form specially authorized by Sec. 1757, Rev. Sts. XIX, 89, *October, 1865*; 376, *January, 1866*.

1808. Section 2 of the act of Congress, approved May 13, 1884 (23 Stat. 22), provides that the oath of office to be taken by any person appointed to an office in the military service shall be that prescribed in Section 1757, Rev. Sts. Section 1758 provides that this oath "may be taken before any officer who is authorized either by the laws of the United States or by the local municipal law to administer oaths."

<sup>1</sup> Repealed by act of May 13, 1884 (1 Sup. Rev. Sts., 428), which provides that the oath to be taken by officers shall be that prescribed in Sec. 1757, R.S. See § 1810, *post*, and note.

<sup>2</sup> That employees who are not officers are not required to take the oath prescribed by Sec. 1757, Rev. Sts., see 1 Comp. Dec. 540, and authorities cited; 3, *id.*, 92.

*Held* that an oath of office taken before an assistant postmaster was not sufficient; such officer not being empowered, either by the Federal or the local law, to administer such an oath. 39, 19, *February, 1890*.

1809. Officers of the army are authorized to administer oaths of office, by Sec. 392, Rev. Sts., to the Postmaster General and "persons employed in the postal service." 50, 74, *October, 1891*; Card 8725, *August, 1900*. And *held* that the officers—judge advocates and trial officers—designated in the act of July 27, 1892, c. 272, s. 4, and authorized to administer oaths for "purposes of military administration," have, under this act and Section 1758, Rev. Sts., authority to administer oaths of military office.<sup>1</sup> Card 4441, *June, 1898*.

1810. The Constitution requires all executive officers of the Government to take an oath to support it, and by an act of Congress approved May 13, 1884 (23 Sts., 22), repealing Section 1756, Revised Statutes, persons appointed in the military service are required to take the oath prescribed in Section 1757, Revised Statutes. Section 1756 expressly required that the oath therein prescribed should be taken before entering on the duties of the office and before being entitled to any of the salary or emoluments thereof, but this section was wholly repealed, and all that stands in its place is the requirement to take the oath given in Section 1757. There is therefore no existing requirement as to the time when the oath shall be taken. So where an officer having accepted an appointment as second lieutenant in the Signal Corps, and taken the oath of office before a person not authorized to administer it, *held* that a second oath should be taken and, if taken, the term of service could be counted from the date of acceptance.<sup>2</sup> Card 4567, *July 12, 1898*. See Card 6644, *June, 1899*.

#### OFFICE.

1811. A public office<sup>3</sup> is a place created by statute or by virtue of a power conferred by statute, for the purpose of the administration of public affairs, and the holder of which is appointed or elected and not employed by contract merely, and is vested with functions involving

<sup>1</sup>See Case, 23, A. G. O., 1898.

<sup>2</sup>Compare *Mechem, Public Officers*, 195. That the requirement as to taking the oath is directory and the term of office and compensation begin with the acceptance of the office, see *U. S. v. Flanders*, 112 U. S. 88; *U. S. v. Eaton*, 140 *id.* 231; 4 Comp. Dec. 496, 601; *id.* 672. In cases of promotions in the Army by "immemorial custom and practice" and as fixed by regulations "recognized and sanctioned by Congress," pay begins with dates of vacancies. Dig. Dec. Second Comp., vol. 3, sections 807, 882; see, also, Jar. 1306, A. R. of 1895.

<sup>3</sup>An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The duties are continuing and permanent, not occasional and temporary, and are defined by rules prescribed by government and not by contract. *U. S. v. Hartwell*, 6 Wall. 385; *U. S. v. Greunme*, 90 U. S. 508—see, also, *U. S. v. Mount*, 124 *id.* 307; *U. S. v. Maurice*, 2 Brock. 98 (Federal Cases, No. 13,747); *U. S. v. Bloom-*

the action of some part of the machinery of government (legislative, executive, or judicial) belonging to the political community whose agent he is. Card 2301, *May, 1896*.

1812. It is a rule of law that when a person holding one office enters upon another, a performance of the duties of which is incompatible with the performance by him of the duties of the first, he abandons and vacates the first office in entering upon the second.<sup>1</sup> Thus *held* that a captain of New York cavalry who accepted, July 20th, 1864, the office of captain and assistant quartermaster of volunteers vacated on that day his office of captain of cavalry. 40, 153, *April, 1890*. But *held* that a captain of cavalry did not vacate his office as such by the acceptance of professor of the U. S. Military Academy there being no legal incompatibility or inconsistency in the functions of the two offices.<sup>2</sup> 56, 151, *October, 1892*.

part, 2 Benedict, 356 (Federal Cases, No. 14,612; *in re* Hathaway, 71 N. Y. 238; Rowland v. Mayor 83 *id.* 372; *People v. Duane*, 121 *id.* 307; *in re* Corliss, 11 R. I. 640; *Wilcox v. People*, 90 Ill. 186; *Throop v. Langdon*, 40 Mich. 673; *State v. De Cross*, 53 Tex. 387; 13 Opins. At. Gen. 310; 20 *id.* 686; 4 Comp. Dec. 696, and authorities cited. A public officer is the incumbent of an office "who exercises continuously, and as a part of the regular and permanent administration of the Government, its public powers, trusts, and duties". *Shelboygan Co. v. Parker*, 3 Wall., 93. In view of the provisions of the Constitution as to the appointment of officers, unless a person in the service of the United States holds his place by virtue of an appointment by the President, or of one of the courts of law, or heads of departments, authorized by law to make such appointment, he is not, strictly speaking, an officer of the United States. *U. S. v. Germaine*, 99 U. S., 508; *U. S. v. Mount*, 124 *id.* 307; *U. S. v. Smith*, *id.* 525; 1 Comp. Dec. 540; 4 *id.* 703; 5 *id.* 649. As to retired officers holding office, see note 1, page 623 *post*.

<sup>1</sup> In the absence of a statutory prohibition a person may hold two distinct offices, places, or employments which are not incompatible, and receive the compensation attached to each. *Converse v. U. S.*, 21 Howard, 463; *U. S. v. Brindle*, 110 U. S., 688; *U. S. v. Saunders*, 120 *id.* 126; *Meigs v. U. S.*, 19 Ct. Cls. 497; 5 Opins. At. Gen. 708; 19 *id.* 283; 3 Comp. Dec. 432; 4 *id.* 115; 5 *id.* 9; 6 *id.* 284, 683. But the services for which extra compensation is allowed must, under the statutes, be such as have no connection with the duties of the officer and must be rendered under an appointment or employment. *Converse v. U. S.*, 21 Howard, 463; *U. S. v. Saunders*, 120 U. S., 126; 19 Op. At. Gen. 283; 5 Comp. Dec. 9; 6 *id.* 284, 683. Under section 2 of the act of July 31, 1894 (28 Stats., 205), an officer, other than a retired officer elected or appointed as specified therein accepting or continuing to hold after the passage of that act an office with an annual salary of \$2500 or more, vacates any other office to which compensation is attached. 2 Comp. Dec. 33. See, however, *U. S. v. Harshbarger*, 172 U. S., 567. As to two persons holding the same office, pending notice of appointment of successor, see 7 Opins. At. Gen. 303; 1 Comp. Dec. 576; 3 *id.* 249.

<sup>2</sup> Concurred in by the Secretary of War. See, however, 20 Opins. At. Gen. 427, where Atty. General Miller held that the acceptance of an appointment as Chief of the Record and Pension Office, War Department, by a surgeon of the army created a vacancy in the latter office, the offices being held to be inconsistent, but said that whether this view be correct or not, the appointment of a successor in the office of surgeon would displace the former incumbent, citing *Blake v. U. S.*, 103 U. S. 227, and *Keyser v. U. S.*, 102 *id.* 336. And where an appropriation was made for "the pay of one assistant professor" of the Military Academy, the act providing for the appointment of such professor in addition to those theretofore authorized. Attorney General Olney held that as the term of the new office would not begin until the next fiscal year, the acceptance of the appointment thereto by an officer of the army would not vacate his office until the term of the new office actually commences. 20 Opins. 593. In a decision of the Comptroller the positions of "acting judge advocate and aid to a major general" were held to be "incompatible, and an officer is not entitled to the additional pay of both positions at the same time." 5 Comp. Dec. 971.

**1813.** Section 2 of the act of July 31, 1894 (28 Stats., 205), provides that no person, other than retired officers elected or appointed as therein specified, "who holds an office the salary or annual compensation attached to which" amounts to \$2,500, "shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law."<sup>1</sup> *Held* that while the act of April 22, 1898, for the raising of volunteers (30 Stats., 361) "specially authorized" the appointment of regular army officers by the governors of States and Territories, no such provision was made as to volunteers of the District of Columbia, and a captain receiving an annual compensation amounting to \$2,500 a year could not hold his office in the regular army and accept an appointment as field officer in the regiment of volunteers from the District of Columbia. Card 4119, *May*, 1898.

**1814.** Section 1222, Rev. Sts. (act of July 15, 1870), provides that—"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated." *Held* that this provision was an exercise by Congress of its constitutional power "to raise armies," which includes the power to determine of whom they shall consist.<sup>2</sup> XXX, 556, *August*, 1870.

**1815.** Under the provisions of Sec. 1222, Rev. Sts., an officer on the active list, who accepted, held, or exercised the functions of a civil office after July 15, 1870, ceased to be an officer of the army.<sup>3</sup> XXXV, 54, *December*, 1873.

**1816.** The words "exercises the functions of a civil office" were used in Sec. 1222, Rev. Sts., in order that it might not be necessary to prove in every case that an officer of the army entering upon a civil office had qualified according to all the formalities of the law, but, rather, that the holding of the office whether by formal qualification or otherwise should have the effect of vacating his commission in the army. "Exercising the functions of an office" means something more than merely transacting some of the business of an office as the agent of some one else; it means transacting the business by virtue of holding the office. Thus where an officer on the active list of the army, after having had conferred upon him by a governor of a State the honorary title of colonel and assistant adjutant general in the State militia, took temporary charge of the adjutant general's office of the State at the request of the governor, during the absence of the adjutant gen-

<sup>1</sup>Sec. 2 Comp. Dec., 53.

<sup>2</sup>See *United States v. Bainbridge*, 1 Mason, 71; *Jure Riley*, 1 Benedict, 408.

<sup>3</sup>See the opinion of the Attorney General (14 Opins. 200), that the General of the Army could not exercise the office of Secretary of War without ceasing to be an officer of the army. But see now the act of Aug. 5, 1882 (22 Stats., 238).



eral, *held* that such action on the part of the officer did not amount to the acceptance of a civil office. If, on the other hand, the officer had in fact been commissioned as asst. adjt. genl., accepted the commission, and entered upon the discharge of the duties of the office, he would then have been exercising the functions of a civil office. Card 272, September, 1894.

1817. *Held* that the term civil office employed in Sec. 1222, Rev. Sts., included Federal, State, county, or municipal office. XXXVI, 477, May, 1875; LV, 501, April, 1888. So *held* that an officer of the army could not, without thereby vacating his military office, accept or exercise the office of park commissioner of the City of Philadelphia (XXX, 555, August, 1876); or of trustee on the board of trustees of the Cincinnati Southern Railroad<sup>1</sup> (XXXVIII, 31, March, 1876); or of commander of a battalion of State militia (XLII, 306, May, 1879);—these being offices created by State statute. So *held* that a medical officer of the army could not accept the office of a county physician, and retain his military office. XXXVI, 477, *supra*.

But where a State statute authorized the employment, by the board of water commissioners of a city, of a person as an engineer, and the position was offered to an engineer officer of the army, *held* that such officer, in accepting the same, by the authority of the Secretary of War, would not be affected by the provision of Sec. 1222, Rev. Sts.; such a position being in fact, as it was designated in terms in the statute, an *employment* merely, and one of a temporary and incidental character, and thus properly distinguished from an office. XXXVII, 540, May, 1876. And similarly *held*, later, in regard to the employment of the same officer (under a similar statute) as a consulting engineer to the State engineer; the function of the latter being the office established by the statute, while that of the former was but an incidental employment. XLIII, 307, May, 1880; LII, 271, June, 1887.

1818. So, *held* that an officer of engineers detailed by the President to perform, or assist in, engineering work, for State or municipal authorities, at their request, could not be said to exercise a civil office, and was thus not affected by the provision of Sec. 1222, Rev. Sts.; the only question to be determined in cases of such employment being that indicated by Sec. 1224, viz., whether such work would require the officer to be separated from his corps or otherwise interfere with the performance of his military duties proper.<sup>2</sup> XXXVII, 540, 542, May, 1876; LII, 271, June, 1887.

<sup>1</sup>Concurred in by the Solicitor General, 15 Opns. At. Gen., 551.

<sup>2</sup>It is held by the Attorney General (16 Opns., 499), that while to detail an officer of the active list for duty with Professor King on the U. S. Geological Survey would not be to invest him with a *civil office*, yet that, as such survey is a *civil work*, an officer could not, in view of the provisions of Sec. 1224, Rev. Sts., legally be detailed for duty thereon if the effect of such detail would be to separate him from his regiment, corps, &c., or otherwise interfere with the performance of his military duties proper.

**1819.** Sec. 1222, Rev. Sts., does not apply to enlisted men. But except perhaps in a rare case—as, for example, the case of an ordnance sergeant, or other member of the non-commissioned staff, established at a permanent station—it must in general be quite incompatible with the status and obligation of an enlisted man to hold any civil office or employment, even one held for the mere purpose of qualifying the party to administer oaths, as that of a notary public. XXXVIII, 616, *June, 1877*.

**1820.** There is no statute of the United States which renders a retired enlisted man of the army ineligible for civil office. So *held*, that in the absence of any State statute directly or indirectly disqualifying such person for holding or exercising the office of town constable, he may legally be elected or appointed to and exercise the same. Card 1077, *March, 1895*.

**1821.** There is nothing in the United States statutes or army regulations which prohibits a quartermaster employee (post engineer) from accepting the office of member of a city council. Card 5023, *September, 1898*.

**1822.** *Held* that the position of master machinist at the Springfield Arsenal, conferred by the appointment of the commanding officer, was not properly a Federal office, but an employment simply, so that, upon the appointee being elected a member of the school committee and of the Board of Water Commissioners of Springfield, he could not be said to come within the application of the Executive order of Jan. 28, 1873, declaring that persons holding Federal office should, if accepting State, Territorial or municipal office, be deemed to vacate and resign the Federal office. XXXVI, 223, *February, 1875*.

**1823.** Officers on the *retired list* are not affected by the provisions of Sec. 1222, Rev. Sts.<sup>1</sup> They may hold any State, county or municipal office, and receive the emoluments of the same without their military office or pay being in any manner affected. Nor will their holding military office under the United States operate as a disability to their receiving office or pay under the State, in the absence of any State statute creating such disability. XXXI, 136, *January, 1871*; XLI, 662, *August, 1879*; XLII, 165, *February, 1879*; Card 3327, *June, 1897*.

**1824.** *Held* that the prohibition of Sec. 1860, Rev. Sts., that "no person belonging to the army or navy shall be elected to or hold any civil office or appointment in any *Territory*," included officers on the *retired* as well as on the active list of the army.<sup>2</sup> XLII, 111, *January, 1879*.

<sup>1</sup> To a similar effect, see 15 Opins. At. Gen., 306.

<sup>2</sup> But see, now, the act of March 3, 1883, excepting *retired* officers from the application of the original provision.

1825. By a provision of the act of March 30, 1868, c. 38, s. 2 (now incorporated in Sec. 1223, Rev. Sts.), it was declared—"that any officer of the army or navy who shall, after the passage of this act, accept or hold any appointment in the diplomatic or consular service of the Government, shall be considered as having resigned his said office, and the place held by him in the military or naval service shall be deemed and taken to be vacant." *Held*, in the case of an officer of the army who at the date of this statute was holding a diplomatic position, that his military office must be regarded as vacated unless he forthwith resigned his diplomatic office on being advised of the passage of the act; that he could not legally be allowed to continue to hold his military office for a certain time till his services in the diplomatic office could conveniently be dispensed with. XXVI, 655, *July, 1868*.

1826. *Held*, that the act of March 30, 1868, c. 38, s. 2 (now Sec. 1223, Rev. Sts.), applied to officers on the retired list equally and alike with officers on the active list of the army, and that an officer on the retired list who, subsequently to the passage of said act, accepted an appointment in the diplomatic service, became *eo instanti* separated from the army, - his military office ceasing thereupon to exist. XXIX, 1, *Jan., 1869*.

1827. *Held* that an engineer officer of the army could not act as a member of the "River Commission for Mobile River and Branches" without vacating his military commission under Sec. 1222, Rev. Sts.; such river commission being established as a "public body politic" by an act of the Alabama legislature of 1887, and a membership of the same being clearly a civil office. LV, 501, *April, 1888*.

1828. By "civil office," as the term is used in Sec. 1222, Rev. Sts., is undoubtedly meant civil *public* office. The presidency of the American Society of Civil Engineers does not involve the exercise of any public functions; so *held* that it was not a "civil office" and could be accepted by an officer of engineers of the army without his military commission being affected. 62, 420, *November, 1894*.

1829. A resolution of the Board of Supervisors of the City and County of San Francisco empowered an engineer officer of the army, with others, to devise and provide a system of sewerage for that city

<sup>1</sup>See opinion of the Attorney General in 15 Opins. 306. In a later opinion (15 Opins. 407), the words "every such officer" in the proviso of s. 2 of the act of March 3, 1875, c. 178, were construed by the same authority as expressing the intent of Congress to so limit the application of the provision of March 30, 1868 (sec. 1223, Rev. Sts.), that it should not affect the *status* of any officers borne on the retired list at the date of the first named act, March 3d, 1875, who were included within the preceding part of the proviso; but otherwise as to other retired officers. See also *Baden v. U. S.*, 130 U. S. 439.

That a *resignation* of a second office, the acceptance of which has operated to vacate an office previously held, will not work a re-investiture of the original office, see *In re Corliss*, 11 R. I. 643.

and county. *Held* that such officer, in accepting, would not be appointed to a civil office in the sense of Sec. 1222, Rev. Sts., but would be simply *employed* (with the approval of the Secretary of War) to perform a certain temporary service. The case distinguished from that of Col. Gillmore, Corps of Engineers.<sup>1</sup> 54, 64, *June, 1892*.

1830. *Held* that an officer of the army could, without ceasing to be such officer under Sec. 1222, Rev. Sts., be assigned to and perform the duties of Adjutant General of the District of Columbia Militia, the same not being (at the time) a "civil office" created by law.<sup>2</sup> LII, 271, *June, 1887*.

1831. *Held*, in view of the provisions of Sec. 1224, Rev. Sts., that an officer of the army could not legally be detailed in the service of "The World's Exposition of 1892," which is a *corporation*, nor upon "civil works" under the "World's Columbian Commission," which is not a corporation. And *advised* that, irrespective of the statute, to assign an officer of the army to a duty which must, entirely or in great measure, and for any considerable period, separate him from the military duty for which Congress has authorized his employment and his pay, would, in the absence of statutory sanction, be unauthorized. 49, 211, *September, 1891*. Also further *held*, in view of Sec. 1224, Rev. Sts., that an officer of the army could not legally be detailed to inspect the buildings in the course of construction for the World's Columbian Exposition, since such inspection would be an employment "on civil works," and would require his separation from his corps and interfere with the performance of his military duties.<sup>3</sup> 49, 245, *September, 1891*.

1832. The convention between the United States of America and the United States of Mexico dated March 1, 1889, provided for an "International Boundary Commission" to be composed of (1) a commissioner appointed by the President of the United States of America, and of another to be appointed by the President of Mexico, in accordance with the constitutional provisions of each country; (2) of a consulting engineer appointed in the same manner by each government; and (3) of such secretaries and interpreters as each government may see fit to add to its commission. On the question whether the acceptance by an officer of the army (captain of engineers) of an assignment or detail as "associate member," the same to be made by the Secretary of War,

<sup>1</sup>Col. Gillmore's case referred to is reported in 18 Opins. At. Gen. 11. And see Gen. Meade's case in 13 *id.* 310; also case in 16 *id.* 499. Compare the still more recent opinion of the Atty. Gen. in 20 Opins. 604.

<sup>2</sup>See now act March 1, 1889 [25 Stats., 172], authorizing such assignment.

<sup>3</sup>Compare case in 19 Opins. At. Gen. 600. Congress, subsequently, by act of August 5, 1892, expressly authorized the Secretary of War to detail at his discretion officers of the army "for special duty in connection with the World's Columbian Exposition."



would vacate the officer's commission, *held*, that the boundary commission in question could have no members other than the three classes above mentioned; that such members are officers thereof and hold civil offices; and that while the Secretary of War was without power to make, by assignment or detail, a person a member of the commission, the exercise by an army officer, under such assignment or detail of the functions of the office of a member would under the provisions of Sec. 1222, Rev. Sts., vacate the officer's commission in the army. But *remarked* that if the officer were merely detailed to consult with and advise the consulting engineer of the commission and not authorized or required to perform any official act purporting to be an act of a member, he would not, by acting pursuant to such a detail, vacate his commission in the army. Card 2236, *April, 1896*.

**1833.** If the position of assistant to the postmaster at Mescalero, New Mexico, is an office, an officer of the army on the active list would under Sec. 1222, Rev. Sts., by accepting it, vacate his commission in the army. If it is not an office, the same result would follow his holding said position and exercising the functions of postmaster. Card 1854, *November, 1895*.

**1834.** The position of colonel of a division of the "Rhode Island Division, Sons of Veterans, United States of America," is not a civil public office within the meaning of Sec. 1222, Rev. Sts. Card 2887, *February, 1897*.

**1835.** While the act of July 13, 1892 (27 Stats. 120), authorizes the detail of army officers as Indian agents, there is no statute specially authorizing an army officer to hold the office of assistant to the Deputy Commissioner of Indian Affairs. If such position is a "civil office" within the meaning of Sec. 1222, Rev. Sts., an army officer on the active list could not accept it or exercise the functions thereof without vacating his commission in the army. Card 2789, *December, 1896*.

**1836.** The assignment of officers of the army as collectors of customs in Cuba and Porto Rico, being in foreign territory under military occupation, *held* assignments to military duty and not to civil offices within the meaning of Sec. 1222, Rev. Sts. Card 5771, *February, 1899*.

**1837.** Whether a person who holds a State or county office can accept and hold an office as commissioned officer in the volunteer army of the United States without vacating his civil office is a question to be determined by the laws of the State.<sup>1</sup> Cards 4079, 4493, *April and June, 1898*.

<sup>1</sup>Under date of June 30, 1898, the Attorney General held (22 Opins. 88) that the provisions of Section 1222, Revised Statutes, do not apply to an officer of the United States volunteers for the reason that he is not an "officer of the army on the active list" within the meaning of that statute.

## OFFICER.

1838. On account of the want of familiarity with the procedure of military courts on the part of militia officers of Louisiana, it was asked by the adjutant general of that State whether it would be admissible to detail upon such courts officers of the army who might be serving in the State, in connection with militia officers. *Held* that, apart from the provision of Sec. 1658, Rev. Sts., that such courts should be composed of militia officers only (see MILITIA), the Secretary of War would not be authorized to order officers of the army upon a duty so clearly outside of the functions devolved upon them by existing law, in the absence of express authority received from Congress. 60, 168, *June, 1893*.

1839. Where an officer of the army, having become accountable under Sec. 1304, Rev. Sts., for a deficiency or damage to military supplies, had deceased, *held*, in the absence of the exculpatory evidence indicated in the section, that the amount of such deficiency, &c., was chargeable against the pay due his estate. 16, 236, *April, 1887*.

1840. The object of the act of Feb. 3, 1887, c. 92, was to remunerate men for services rendered as officers prior to their being actually mustered in as such. It was not intended, however, to be used to make a person an officer who was not such. It did not provide for a re-muster, but declared that persons commissioned as officers should be considered, for purposes of pay, as having been mustered from the date when they commenced their services. 38, 30, *January, 1890*. A person was appointed an assistant surgeon of a volunteer regiment, and performed his duties as such from December, 1862, to February, 1863, without being mustered in. *Held* that he was a *de facto* officer, and entitled, under the act of Feb. 3, 1887, to pay for the said interval. 44, 244, *December, 1890*.

1841. G. O. 92 of 1862, War Department, provided that "all officers and privates fit for duty absent at that time (from the special muster of August 18, 1862) will be regarded as absent without cause, their pay will be stopped and they dismissed from the service or treated as deserters, unless restored; and no officer shall be restored to his rank unless by the judgment of a court of inquiry to be approved by the President, he shall establish that his absence was with good cause." The order also provided that disability from wounds received in the service should be a sufficient excuse for absence from the special muster of August 18, 1862. Under this order a first lieutenant, First Battery, Minnesota Light Artillery, being absent from the special muster of August 18, 1862, was dropped as a deserter. Subsequently a court of inquiry found that he was absent in consequence of wounds received in

action, and he was restored to duty January 12, 1863. After he was dropped as a deserter a sergeant of the battery was commissioned as first lieutenant in his stead. The sergeant was not formally mustered in as first lieutenant but from August 26, 1862, to January 1, 1863, he rendered services as such and was paid therefor, and on January 1, 1863, was mustered in as captain of the battery. He was never formally discharged as an enlisted man, and the apparent vacancy in the grade of sergeant during the time he was performing the duties of first lieutenant under his appointment as such, was not filled. *Held* that the dropping of the original first lieutenant as a deserter was only conditional and that his office was not thereby vacated. He was therefore from August 26, 1862, to January 1, 1863, an officer *de jure*, while the sergeant supposed to have been promoted was during the same period an officer *de facto*; his actual status being that of a sergeant performing the duties of first lieutenant of his battery. Card 1395, *August, 1896*.

#### OFFICER'S SERVANT.

1842. *Held* that officers' servants, being a part of the officer's household, were entitled equitably to admission to post hospitals, and should not be regarded as a class subject to par. 1630, A. R. of 1880, relating to the admission to such hospitals of "civilians not in public service." They should be treated with the same liberality in this respect as is shown in the furnishing of subsistence supplies, which an officer is entitled to purchase not only for his own use but for that of his household.<sup>1</sup> 37, 460, *January, 1890*.

#### OFFICIAL PAPERS.

1843. The official papers on file in the War Department are not public records open to the inspection of any citizen; but, except in so far as law or usage has provided for the furnishing of copies of the same or the publication of their contents, as in the case of the records of military courts, such papers are confidential archives of the Government which may be consulted, or of which copies may be furnished, only by the authority of the Secretary of War, except where the courts of law may properly require their exhibition in evidence.<sup>2</sup> The Secretary, in his capacity as an agent of the public, will of course be disposed to grant to proper persons such facilities for obtaining information from the records of his department as may, with due

<sup>1</sup> A stricter view is expressed in Circ. No. 1, A. G. O., 1890.

<sup>2</sup> The admission of copies in evidence is authorized by Sec. 882, Rev. Stat., as follows: "Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof."

regard to the public interests, be accorded. Where application is made for copies of papers, it will be for him, in view of the nature of the information sought, the use proposed to be made of the same, &c., to determine, in his discretion, whether the private interests involved are such as properly to outweigh any public considerations which may exist against granting the privilege. In furnishing copies, a distinction will properly be made between documents in the nature of permanent records, such as general or special orders, muster rolls, discharges of soldiers, commissions of officers, &c., and the reports and communications of officers addressed to military superiors or to the Secretary of War in the line of their official duty. The latter are generally regarded as *privileged communications* which even the courts, on grounds of public policy, will in general hold to be incompetent testimony and of which they will refuse to require the production in evidence.<sup>1</sup> XIX, 375, and XXI, 142, *January, 1866*; XXIV, 27, *November, 1866*; XXVIII, 26, *July, 1868*; Card 7912, *April, 1900*.

1844. *Held* that all useless and valueless official papers pertaining to the records of military headquarters, posts or stations, could legally be destroyed by an order of the Secretary of War without a resort to legislation. 63, 120, *January, 1894*.

1845. Under Section 882, Revised Statutes, "copies of any books, records, papers or documents in any of the executive department, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof." The certificate under this section should be that the papers attached thereto are true *copies* of papers, records, etc., on file, and not "that the attached papers are found on the files of his office and form part of the records thereof." And the copies furnished should be copies of *original* "books, records, papers, etc.," and not *copies of copies* of the same. Until therefore the original books, records, etc., are filed in a department, it cannot furnish the copies contemplated by Section 882. Card 2433, *July, 1896*.

1846. The attorneys for a railroad company in a suit pending in a

<sup>1</sup> See *Dawkins v. Ld. Rokely*, 8 Q. B. 255; *Dawkins v. Ld. Paulet*, 5 L. Rep., Q. B. 24; *Dickson v. Earl of Wilton*, 1 Fes. & Fin. 419; *Home v. Ld. Bentinck*, 2 Brod. & Bing. 130; *Beatson v. Skene*, 5 Hurl. & Nor. 837, 855 (Am. Ed.); *Gardner v. Anderson*, 22 Int. Rev. Rec. 41; 1 Greenl. Ev. § 251; 11 Opins. At Gen. 142, 15 *id.* 378, 415. In the recent case of *Maurice v. Worden*, 54 Md. 233, —an action for damages on account of a libel claimed to have been contained in a communication of the class indicated in the text—it was held that, while such a communication is not "*absolutely privileged*," it is "*privileged*" to the extent that the occasion of making it rebuts the presumption of malice, and throws upon the plaintiff the *onus* of proving that it was not made from duty but from actual malice and without reasonable and probable cause." But see dissenting opinion of Miller, J. See also Am. and Eng. Ency. of Law (1st ed.) v. 12, 423; Best Principles of Ev. 561, note a; Wharton, Law of Ev. v. 1, § 604; *Worthington v. Scribner*, 100 Mass. 487; *Appeal of Hartman et al.*, 85 Pa. St. 433; U. S. v. Six Lots of Ground, 1 Woods, 234 (Fed. Cases, No. 16,299).



United States circuit court against the City of Chicago, made application to the War Department for an authenticated copy of certain records of the headquarters of a military department (Department of Missouri), accompanied by a certificate from the judge of the court that the copies were deemed essential to the ends of justice on the trial of the case, and the application was granted. In the matter of the authentication of the copies, *advised* that the Secretary of War could only certify to the identity of the custodian (the adjutant general of the department), and that his attestation was authentic and in proper form. Whether this would be sufficient to make the copies admissible as evidence under Sec. 882, R. S., is a question to be determined by the court if the same is raised. Further advised therefore that the certificate of the Secretary need not contain a statement that the records were records of the War Department—as an executive department of the Government—within the meaning of the statute. Card 1970, *January, 1896*. But *held* that the “engineer offices in the department at large” may be considered a part of an executive department within the meaning of this statute. Card 7912, *April, 1906*.

#### ORDER—IN GENERAL.

1847. General or special orders relating to the army, issued from the War Department by the Secretary of War or by his direction, are to be presumed to be made by the authority of the President, and to be viewed as his orders equally as if he had subscribed the same. VIII, 297, *April, 1864*. See § 2294, *post*.

1848. No precise rule can be laid down as to *when* a military order, affecting the status, pay, rights, or duties of an officer, can be said to become operative as regards himself. A general principle, analogous to that of the law of *notice*, should ordinarily be applied to the cases, and the order be treated as not legally taking effect until the officer is personally officially notified of the same. In the absence of an actual personal delivery to or receipt by him of the order or an official copy, the fact of the promulgation or receipt of the same at his proper military station, will in general be presumed to have given him official notice of its contents—a presumption, however, liable to be rebutted by proof that, without any fault or negligence of his own, knowledge of the same was never actually brought home to him, as where, for example, he was at the time absent on leave, or ill at a distant hospital, or a prisoner in the hands of the enemy, and therefore was not notified in fact. The notice of the order, to affect the officer, should thus be a *personal* notice, actual or constructive, and it should be an *official* notice. XII, 230, and XIII, 284, 335, *January, 1865*; XIX,

696, *October, 1866*; XXII, 506, *December, 1866*; XXVIII, 423, 426, *March, 1869*; XXX, 481, *July, 1870*; XXXIV, 364, *July, 1873*; 49, 91, 176, *September, 1891*; 65, 289, *June, 1894*.

Where indeed the officer fails to receive personal official notice by reason of some fault or neglect of his own, as because of his having absented himself without authority from his station when the order arrived, or because, being on detached service, he has not duly advised the Adjutant General of his address as required by the Army Regulations, he will not be permitted to take advantage of his own wrong; and the receipt of the order at his proper station or last reported station, will be held to operate as due and effectual, or constructive, notice. XXXI, 327; *April, 1871*; 65, 289, *June, 1894*; Card 1289, *April, 1895*.

1849. Up to the date of personal official notice of an order separating him from the military service—as an order of summary dismissal by the President, or an order “wholly retiring” him, or an order confirming a sentence of dismissal adjudged by a court martial—an officer is entitled to be paid by the United States the regular and legal pay and allowances of his rank.<sup>1</sup> XXII, 506, *December, 1866*; XXIX, 115, *July, 1869*; XXXI, 216, 327, *March and April, 1871*; XXXV, 178, *February, 1874*. The date which the order bears, as that of the issuing or signing of the same, is immaterial, if notice of the same is not duly brought home to the officer till on a subsequent day. XXXI, 216, *March, 1871*; 49, 91, 176, *September, 1891*.

1850. An order affecting a military person becomes operative as to such person when he has received military notice of its existence and contents; that is if the order be general in character it becomes operative when it has been formally promulgated to the command to which it pertains; if it be special or individual in its operation it becomes effective when it has been served upon, or received, by such person through the usual military channels.<sup>2</sup> It may be regarded as an established practice in our service that the date of receipt of a general order by a command is the date on which it takes effect as to that command. It is not necessary to go further and attempt to trace the general order to each individual. Such a general order is not unlike a statute of general character, in that it puts forth a binding general rule of action, intended for the guidance of a whole community, and when no other date is indicated, the date of the order is the date when it takes effect;<sup>3</sup> but the custom of the service (established practice)

<sup>1</sup> See 7 Comp. Dec. dated March 16, 1891.

<sup>2</sup> *Davis's Military Law*, 382.

<sup>3</sup> This refers to the rule that, except when otherwise provided by Constitution or statute, a statute takes effect on its passage, as in the case of an act of Congress.

which it must be remembered has the force of law,<sup>1</sup> modifies this, to the extent stated above, but to that extent only. This custom of the service is a modification of the principle that no military person can plead ignorance of military law (including regulations), and were it not for this modification the principle in all its severity would be legally applicable. When the date of the receipt of the general order by the command cannot be ascertained, the only fixed date that there is, namely the date of the order, should be taken as the date when it took effect, particularly in cases where the general orders affect the military history of soldiers in the past and a fact of that past history is to be determined; but a soldier can not be held criminally responsible under a general order after its date, but before knowledge of it could have reached the command to which he belonged. Card 8962, *September, 1900*.

1851. An order cannot create a fact to-day and carry it back to some date, and there set it up as a fact occurring on that date, whereas in reality no such fact then occurred. But care should be taken to distinguish between such an impossibility and a legally retroactive executive order or regulation, as when a thing is done without the approval of the Secretary of War, his approval being required, and he subsequently ratifies the thing done.<sup>2</sup> Between such action as this and the

<sup>1</sup> 84th A. W.; Winthrop Military L. & P. 42, 438; Davis's Military Law, 10, 1b Hart, 164, Benet, 119.

In the Regulations for the British Army it is laid down that "ignorance of published orders will never be admitted as an excuse for their non-observance"; but in that service the regulations in reference to the promulgation of orders are more specific than ours. They require, among other things, that all orders specially relating to the soldiers are to be read and explained to them immediately after such orders are received and those of an important nature are to be read to them on three successive parades.

<sup>2</sup> This is certainly correct, but it would be well to notice that the instance of a legal ratification which is given does not cover the whole subject. There are acts which neither statute nor regulation authorizes an officer to do subject to the approval of a higher authority, but which, when done by him, may be validated by ratification, and it would probably be useful to determine what kind of acts these are.

The principal rule to be laid down in this regard would seem to be that the act must be one power to do which the higher authority might legally delegate to the inferior at the time of the ratification and might have delegated at the time the act was done. If the superior authority could not thus delegate the power he could not ratify the act. He could not ratify an act which he had no authority to do himself, thus, he could not ratify an act violating a law. And another restriction arises out of the character of the act, whether ministerial or judicial or discretionary. Judicial power and also such power as is by law entrusted to the discretion of the superior authority cannot be delegated by him to another, nor can he ratify such an act when done by the other. Such at least would seem to be the strict rule in the relation of the superior officer and subordinate. As stated by Meehan (*Meehan on Public Officers*, § 567):

"In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another." And the same author says (§ 529)

"It is, therefore, the general rule that one may ratify the previous unauthorized doings by another in his behalf, of any act and of that only which he might then and

attempt to manufacture a fact as happening in the past it is important, but not difficult, to distinguish. Thus all orders in the cases of officers and enlisted men, which purport to make appointments, acceptances of resignations, discharges from the service, or muster-out of service date from, or take effect from, dates prior to the issuance of the orders therefor, are instances of the attempts referred to and are illegal. Card 8962, September, 1900.

1852. Where an officer, who had been tried by a court-martial was, while awaiting the promulgation of the proceedings, taken prisoner by the enemy, and, after his capture, an order was published in his regiment, by which a sentence pronounced by the court, dismissing him from the service, was duly confirmed—*held*, that as he was beyond the control of the national authorities at the time of such publication, he could not be regarded as notified of such order or affected by it; and that he therefore continued to be an officer in the army and entitled to pay as such up to the date—about six months subsequent to his capture—when, upon being exchanged, he returned to his regiment in the field and was first notified of his dismissal as approved. XII, 230, January, 1865. See § 2062, *post*, and note.

1853. The order of a commanding officer will in general constitute a sufficient authority for acts regularly done by an inferior in compliance with the same. Where, however, the order of the superior is a palpably illegal order, the inferior cannot justify under it;<sup>1</sup> and if brought to trial by court martial, or sued in damages for an act done by him in obedience thereto, the order will be admissible only in extenuation of the offence.<sup>2</sup> XXV, 392, June, 1868.

In the *Fair* case (*In re Fair*, 100 Fed. Rep., 149) the following language of the court in *McCall v. McDowell* (Federal Cases, No. 8673) is cited with approval: "Except in a plain case of excess of authority,

could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done."

Whether the foregoing can, in all strictness, be applied to military relations, I am not entirely prepared to say. Theoretically it is, I think, correct, but I believe that it has not been very closely adhered to in practice. The performance of acts of a purely ministerial or executive nature can always be delegated—or ratified, unless expressly prohibited or the power is expressly exclusively vested in the superior. (Note by Judge-Advocate General to opinion of Sept. 14, 1900, Card 8962, *supra*.)

<sup>1</sup>See *Harmony v. Mitchell*, 1 Blatch., 549; *Mitchell v. Harmony*, 13 How., 115; *Durand v. Hollins*, 4 Blatch., 451; *Holmes v. Sheridan*, 1 Dillon, 357; *McCall v. McDowell*, Dundy, 243, and 1 Ab. U. S. R., 272; *Clay v. United States*, Duvieux (Ct. Cls.), 25; *United States v. Carr*, 1 Woods, 480; *Bates v. Clark*, 5 Otto, 204; *Ford v. Surget*, 7 Otto, 594; *Skene v. Monkenner*, 21 Ind., 1; *Griffin v. Wilcox*, *id.* 391; *Riggs v. State*, 3 Coldw., 851; *State v. Sparks*, 27 Texas, 632; *Keighly v. Bell*, 4 Fost. and Fin., 805; *Dawkins v. Rokeby*, *id.* 831. The law is the same although the order to the inferior may emanate directly from the President. See *Effort v. Bevins*, 1 Bush, 460.

<sup>2</sup>*State v. Sparks*, *supra*; *Metall v. McDowell*, *supra*; *Milligan v. Hovey*, 3 Bissell, 13; *Beckwith v. Bean*, 8 Otto, 206.



where at first blush, it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not, as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions". While this may be true as applied to criminal cases (although *McCall v. McDowell* was a civil case), it certainly is not correct in civil cases". See *Bates v. Clark*, 95 U. S. 204, in which the Supreme Court held in a civil suit for damages as follows: "It is a sufficient answer to the plea, that the defendants were subordinate officers acting under orders of a superior, to say that whatever may be the rule in time of War and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority."<sup>1</sup> Card 7500, June, 1900.

**1854.** An order from the War Department assigning a certain officer to a duty (acting judge-advocate) in lieu of another named, relieves the latter and his detail ends with the date of such assignment. That the commander of the department in which he was serving omits at the time to issue the usual order relieving him does not affect his status, or entitle him to be paid, as of the special rank of the detail, up to a subsequent date when the department commander did actually issue such an order. He was relieved *in fact* by the original order of assignment of a successor when the latter entered upon the duty under the order. 52, 499. March, 1892.

**1855.** A post commander issued an order to the effect that any officer of the command whose explanation of an absence from a roll-call should not be satisfactory should be restricted to the limits of the post, except when permitted to absent himself upon a written application for such absence approved by the commander. *Held* a legal order, not an arbitrary exercise of a disciplinary punishment. LV, 391, March, 1888.

**1856.** Where a post commander issued an order allowing the soldiers

<sup>1</sup> But that officers and soldiers of the United States who, in good faith without any criminal intent, but with an honest purpose to perform a supposed duty as soldiers under the law of the United States, act in obedience to an order, the illegality of which is not apparent and palpable to the commonest understanding, are not liable to prosecution under the criminal laws of a state, see further the case of *Fairchild* in the text. See also *U. S. v. Clark*, 31 Fed. Rep., 710.

of his command between certain hours, when "off duty," limits extending one mile beyond the military reservation, and forbidding them to enter or patronize within said limits gambling houses, saloons, etc., *held* that he did not exceed his authority in the matter. Card 1210, April, 1895.

#### ORDER—CONVENING A COURT MARTIAL.

1857. *Held* that the fact that the order convening a court martial was dated on a Sunday did not affect the validity of the proceedings in a case tried by the court under such order. XXXVII, 317, February, 1876.

1858. An order convening a general court martial should properly be so headed and authenticated, or so authenticated, as to show that it was issued by an officer authorized by the statute law—the 72d or 73d Article of War—to create such a tribunal. Thus *held* that such an order (issued in time of war) signed by an officer describing himself as commanding a "post" or "district" was *prima facie* invalid and inoperative, though capable of being shown to be valid by proof that the command was of such dimensions and so situated as practically to constitute a separate army, division, or separate brigade.<sup>1</sup> XI, 162, 170, 176, 214, November and December, 1864; XXVI, 510, April, 1868.

1859. It is not a material objection to the validity of the proceedings or sentence, that the regiment or corps of a member of the court or of the judge advocate, is erroneously stated in the order convening the court, provided the description given is sufficient to identify the officer. XXXV, 433, June, 1874.

#### ORDER—OF PROMULGATION.

1860. Where a general court martial has had two presidents, it is immaterial whether the first or the second is mentioned in describing and identifying the court in the caption of the order promulgating its proceedings. It is not indeed necessary to indicate the president at all. XIII, 324, February, 1865. Nor is it necessary that such an order should set forth the specifications to the charges; nor—though this is usual, where the business of the court is completed—that it

<sup>1</sup>The order should properly indicate for what trial or class of trials the court is convened, or its terms should be so general in this particular as to authorize the court to entertain *any* case that may be referred to it for trial. A court, restricted by the order convening it to the trial of a special case or class of cases, would not be empowered (in the absence of further orders) to take cognizance of a case not within such designation. See G. O. 106, Army of the Potomac, 1862, where the proceedings of a court martial in a case of a private soldier were disapproved as without jurisdiction, because the convening order had authorized the court to try the cases only of such *offenses* as might be brought before it.

should formally dissolve the court. III, 84, *June, 1863*. An order of promulgation, indeed, is a mere *form*, habitual as a means of communicating the proceedings or their result to the army, for the sake of convenience and example, and of making a summary memorandum of the same, but not necessary to the validity of proceedings or sentence.<sup>1</sup> Though no such order is issued in a case, the proceedings or sentence in the same will be formally complete and fully operative, if the official action thereon of the reviewing authority be duly endorsed upon or appended to the record, and actual or constructive notice thereof is given to the party affected. XXXII, 102, *November, 1871*; Card 1226, *April, 1896*.

## ORDNANCE DEPARTMENT.

1861. It is required, in general and comprehensive terms by Sec. 1167, Rev. Sts., that *all officers, persons, &c.*, who may be intrusted with any ordnance stores or supplies, shall make certain regular returns to the Chief of Ordnance of such property in their possession or charge, according to certain forms and regulations to be prescribed by that officer with the approval of the Secretary of War. The act of March 3, 1879, c. 183, authorizes and directs the Secretary of War, at the request of the head of any department, to issue arms and ammunition, when required for the protection of the public money and property,—“to be delivered to any officer” of such department as may be designated by the head of the same, and to be accounted for to the Secretary of War. *Held* that the provision of Sec. 1167 might properly be regarded as applying to the class of officers indicated in this act, who therefore would properly be required to furnish the returns prescribed by that section. XLI, 210, *March, 1879*.

1862. *Held* that Section 1167, Revised Statutes, does not direct or authorize the Chief of Ordnance, subject to the approval of the Secretary of War, to draw up and enforce in his department a system of rules and regulations for the *inspection* of ordnance property with a view to its condemnation and sale or destruction. Card 63, *July, 1894*.

1863. An officer of the line, on passing the examination for a vacancy in the Ordnance Corps, does not become an ordnance officer by a mere transfer. He must be appointed, confirmed and commissioned in the usual way. 37, 156, *December, 1889*.

<sup>1</sup> The insertion, in an order of publication, of the proceedings had upon a reassembling of the court for a *revision* of its findings or sentence, though at one time occasionally resorted to, is now unusual. Such an addition can hardly be pertinent except where it is designed as a basis for special comments, on the part of the reviewing officer, upon the action of the court in connection with the matter of the revision.

1864. The Army Appropriation Act of June 16, 1892, provided:—"That sergeants of ordnance shall receive the same allowances of clothing as other sergeants in like staff departments." *Held* that this provision entitled these sergeants to receive, free of cost, a certain number of units of the different articles that go to make up their clothing, or, when the allowance was expressed in dollars and cents, the amount which such articles would cost when made up in the form and style required for such sergeants. 55, 326, *September, 1892*.

1865. *Held* that Section 1765, Revised Statutes, does not prohibit the payment of compensation to an ordnance sergeant for work as "time keeper" under the United States Engineer Department, such employment having no affinity or connection with the line of his official duty<sup>1</sup> as ordnance sergeant and not interfering in any way with the same. Card 2570, *September, 1896*.

## P.

### PARDON.

1866. The President is empowered, by Art. II, Sec. 2, par. 1, of the Constitution "to grant reprieves and pardons for offences against the United States"; and a pardon, like a deed, must, in order to take effect, be delivered to and accepted by the party to whom it is granted.<sup>2</sup> Thus there can be no pardon of a *deceased* officer or soldier; and that the pardon is asked by the party's widow or heir, who is to be peculiarly benefited thereby, cannot affect the principle. XV, 486, 654, *July and September, 1865*; XXI, 564, and XXII, 291, *July, 1866*. So where, in a case of an officer who had died while under a sentence of suspension from rank, a pardon was asked for the purpose of having the stigma removed from his record in the service, *held* that the case was not one in which the pardoning power could be exercised. VII, 138, *February, 1864*.

1867. It is the effect of a full pardon (otherwise of a mere *remission* of the *punishment*—see REMISSION) to remove all penal consequences (except of course *executed* penalties—see § 1869, *post*) and all disabilities, attached by U. S. statute (or army regulation) to the offence, or to the conviction or sentence.<sup>3</sup> Thus the pardon of a convicted deserter will relieve him from the loss of the rights of citizenship attached by the act of March 3, 1865 (Secs. 1996, 1998, Rev. Sts.) to a conviction

<sup>1</sup> See *Converse v. U. S.*, 21 Howard 403, *U. S. v. Brindle*, 110 U. S., 688, *Meigs v. U. S.*, 19 Ct. Cl., 497. See, also, § 1812, *ante*, and notes.

<sup>2</sup> *United States v. Wilson*, 7 Peters, 150; *Leve De Puy*, 3 Benedict, 307, 6 Opms. At. Gen., 493. And, in the absence of an express rejection, it is conclusively presumed to be accepted on actual or constructive notice.

<sup>3</sup> 12 Opms. At. Gen., 81, *Leve De Puy*; Garland, 4 Wallace, 380.



of desertion.' XXXI, 183, *February, 1871*. But a pardon by the President will be ineffectual of course to remove a disqualification incurred by the offender under a State statute.' XXIX, 251, *September, 1869*; XLI, 465, *November, 1878*.

1868. *Held* that a pardon extended to an enemy for his offence or offences *as such*, committed during the war, did not entitle him to be paid rent for the occupation of his real estate by the U. S. military authorities while occupying by the right of conquest the region of country in which such estate was situated. XXII, 5, 16, *March, 1866*.

1869. A pardon cannot reach or remit a fully *executed* sentence, though the same may have been unjustly imposed. VIII, 228, *April, 1864*; XXXVI, 631, *August, 1875*. A pardon cannot of course undo a corporal punishment fully inflicted;<sup>3</sup> nor can it avail to restore to the army an officer or soldier legally separated therefrom and made a civilian by a duly approved sentence of dismissal<sup>4</sup> (see I § 1193, *ante*), or by a dishonorable discharge. XII, 427, and XIV, 568, *June, 1865*; XX, 302, *January, 1866*; XLI, 465, *November, 1878*; Cards 2049, 2216, 2174, 2800, *February to December, 1896*; 3810, *January, 1897*; 5624, *January, 1899*. Nor can it restore a fine paid (XVI, 305, *June, 1865*; XXXV, 471, *July, 1874*), or pay forfeited (XX, 90, *October, 1865*; XXVIII, 567, *May, 1869*), when the amount of the same has once gone beyond the control of the Executive and been covered into the U. S. Treasury and become public funds,<sup>5</sup> whatever may have been the merits of the case. XXXVI, 192, *January, 1875*; XXXVII, 445, *March, 1876*; 34, 334, *August, 1889*; Card 3810, *supra*. Otherwise, however, where the money still remains in the hands of a military disbursing officer or other intermediate official,<sup>6</sup> XVI, 676, *November, 1865*. Where, however, any portion of a punishment remains *unexecuted*, that portion may be remitted by the pardoning power.<sup>7</sup> II, 29, *February, 1863*.

<sup>1</sup> 8 Opins. At. Gen., 284; 9 *id.* 478; 14 *id.* 124. And see *People v. Bowen*, 43 Cal., 439. That this disability can attach only upon a conviction, see § 1061, and authorities cited in note.

<sup>2</sup> 7 Opins. At. Gen., 760.

<sup>3</sup> See 8 Opins. At. Gen., 284.

<sup>4</sup> 12 Opins. At. Gen., 548; *Ex parte Garland*, 4 Wallace, 381.

<sup>5</sup> 2 Opins. At. Gen., 330; 16 *id.* 1. This, because the same Constitution which confers the pardoning power contains a provision "of equal efficiency" (Art. I, Sec. 9 par. 7, to the effect that money in the public treasury shall not be withdrawn except by an appropriation made by law. 8 *id.* 281. Compare, in this connection, *Knote v. United States*, 5 Otto, 439, where it was held that an executive pardon would not entitle a party to the proceeds of certain personal effects, confiscated and sold by the United States as the property of an enemy, *after* such proceeds had been duly paid into the Treasury. See also §§ 1272 and 1273, *ante*.

<sup>6</sup> 14 Opins. At. Gen., 601. But see A. R. 952 of 1893 (1053 of 1901).

<sup>7</sup> And the Executive, in the exercise of the pardoning power, "may pardon or remit a portion of the sentence at one time and a different portion at another." 3 Opins. At. Gen., 418.

Congress alone can restore pay fully forfeited to the United States, or otherwise pecuniarily indemnify an officer or soldier for the consequences of a legally executed sentence. XLIV, 270, *January, 1881*; 34, 334, *August, 1889*.

1870. It is the effect of the exercise of the pardoning power by the President to relieve the party from all punishment remaining to be suffered. Where, therefore, he remits the unexecuted portion of a term of imprisonment, an additional penalty, which, by the express terms of the sentence, was to be incurred at the end of the adjudged term, as a dishonorable discharge from the service, cannot be enforced. The pardon having intervened, the sentence ceases to have any effect whatever in law, and the soldier—the remainder of his service being regular—must be honorably discharged. VIII, 669, *July, 1864*; XX, 460, *March, 1866*.

1871. The pardoning power extends to *continuing* punishments, or punishments which are never fully executed, —remitting, in each case the punishment from and after the taking effect of the pardon. Of this class is the punishment of disqualification to hold military or public office, as also that of the losing of or reduction in "files" (or relative rank) in the list of officers of the offender's grade; these being continuing punishments, may be put an end to at any time by a remission by the pardoning power.<sup>1</sup> XXX, 262, *April, 1870*; XXXI, 24, *November, 1870*; XLI, 158, *March, 1878*; 41, 380, *July, 1890*; 56, 434, *December, 1892*; 60, 348, *July, 1894*.

1872. Where a soldier has been duly convicted of desertion, the loss of the rights of citizenship incident thereto are in practice restored by a formal pardon from the President; a remission of the punishment adjudged by the court martial does not have such effect. Card 3010, *June, 1897*.

1873. While to restore to or place upon duty an officer or soldier, when under arrest or charges on account of an alleged offence, would not probably in this country, to the same extent as in England,<sup>2</sup> be regarded as operating as a condonation of the offence, the promotion of an officer while under sentence or awaiting action on the sentence has been viewed as a *constructive pardon* of the offence or offences on account of which he has been tried.<sup>3</sup> But *held* that such a promotion could not operate as a pardon of *other* offences committed by him, of the commission of which no knowledge was had by the Executive at the date of the promotion. XXXV, 649, *November, 1874*. While

<sup>1</sup> See 12 Opins. At. Gen. 547; 17 *id.* 31, 656; G. C. M. O. 54, 1884, and S. O. 116, A. G. O., 1886; also G. C. M. O. 85 A. G. O., 1891.

<sup>2</sup> See Clode, *Mil. Forces of the Crown*, vol. 1, p. 173, Prendergast, 244-5, in connection with the cases cited of Sir Walter Raleigh, Lord Lunn, Capt. Achuson, &c.

<sup>3</sup> See 6 Opins. At. Gen. 123.

ordering or authorizing an officer or soldier, when under *sentence*, to exercise a command or perform any other duty inconsistent with the continued execution of his sentence, has been viewed as a constructive pardon,<sup>1</sup> *held* that to allow an officer, while under a sentence of suspension from rank, to perform certain slight duties in closing his accounts with the United States, could not be regarded as having any such effect. XXXVII, 190, *December, 1875*.

1874. In certain cases of military offenders convicted of larceny of public property or conversion of public funds (or who had escaped from military custody while under charges for such offences) and applying for pardon, *advised* that, even if otherwise thought worthy of pardon, no pardon should be extended to them except upon the condition precedent of their making good the funds appropriated, or the property stolen or its value. I, 366, *October, 1862*; XIX, 132, *November, 1865*; XXVI, 648, *July, 1868*.

1875. The pardon or remission of the unexpired punishments of *soldiers*, where favored by the Judge-Advocate General, has been recommended on grounds of which the principal were the following: - That the soldier was a minor at enlistment; that he was enlisted under false representations as to the kind of service which would be required of him, made by the recruiting officer in disregard of par. 916, Army Regulations; that he enlisted as a mere recruit, did not have the Articles of War read to him, and had no proper comprehension of the gravity of his offence; that he did not comprehend his military obligations on account of an imperfect knowledge of the English language; that he was an Indian scout unacquainted with our language or with the Articles of War; that his offence was wholly or in part induced by harsh or injudicious treatment by a military superior; that excessive or unreasonable duty had been required of him, or that he had been put on duty (as a guard or sentinel, for example) when unfit for the same on account of illness or partial intoxication; that his offence was committed under a provocation, or was accompanied by circumstances of extenuation, to which the court had not given due weight; that prior to his trial and sentence he had been adequately *disciplined* by his commander; that he had been improperly held in irons, or handcuffed, pending the trial; that his confinement had so seriously impaired his health that if continued it would endanger his life; that an unreasonable time was allowed to elapse between his arrest and trial, or after trial and before the approval and promulgation of the sentence. These and other grounds have been taken into consideration, sometimes alone and sometimes in combination or in connection with such further favorable circumstances as voluntary return in case of deser-

<sup>1</sup>See 6 Opins. At. Gen. 714.

tion, previous good character, good conduct under sentence, &c. In cases of *officers*, the principal grounds for recommending pardon or remission have been—a previous good record for efficiency in the service, especially in time of war, a high personal character or reputation, and an apparent absence of a fraudulent or criminal intent in the offence as committed. IX, 245, 595, *June and September, 1864*; XIII, 99, *December, 1864*; XXVI, 540, *April, 1868*; XXVII, 505, *February, 1869*; XXVIII, 340, *January, 1869*; XXXII, 675, *June, 1872*; XXXIV, 661, *December, 1873*; 40, 386, *May, 1890*; 41, 273, *June, 1890*.

1876. In cases in which military offenders—such as deserters from the army remaining at large, or officers or soldiers who have escaped from military custody while in arrest or under sentence—have applied from their places of refuge for executive pardons, it has almost invariably been *advised* by the Judge-Advocate General that the application be not entertained till the fugitive from justice should return and surrender himself to the military authorities to stand his trial or abide by his sentence. XVII, 264, *September, 1865*; XIX, 132, *November, 1865*; 690, *September, 1866*; XXII, 285, *July, 1866*; XXIII, 303, *October, 1866*; XXVI, 648, *July, 1868*; XXXIV, 661, *December, 1873*; XXXV, 551, *August, 1874*; XXXVIII, 607, 652, *May and June, 1877*; XXXIX, 324, 326, *November, 1877*; XLIII, 171, *January, 1880*; 39, 482, *March, 1890*; 44, 390, *December, 1890*; Cards 3304, 3656, *June and November, 1897*; 5342, 5733, 5885, *January and February, 1899*.

1877. In cases of deserters from the army and from the draft, who, during the war of the rebellion, when men of patriotism and honor were offering their lives in the service of their country, took refuge in Canada—shirking a grave public duty at a critical period of national peril—and remained there till the close of the war, when, in the prospect of returning peace, they addressed to the Executive applications for pardon, *advised*, invariably, that such applications be denied. XVII, 208, *August, 1865*; XX, 44, *October, 1865*.

1878. A party who has been pardoned by the President for a political offence, or has taken advantage of a proclamation of amnesty (such as that of May 29, 1865, or Dec. 25, 1868), is not thereby relieved from amenability to trial and punishment for a crime, not of a political character, committed by him, or from the legal consequences of the commission of such a crime. XXVIII, 304, *February, 1869*; XXIX, 35, *June, 1869*.

1879. A pardon is not retroactive. It cannot remit an executed punishment or restore an executed forfeiture resulting either by operation of law or sentence. It cannot therefore restore the forfeitures incident upon desertion. Further it cannot modify past history, or



reverse or alter the facts of a completed record. From and after the taking effect of a pardon, the recipient is innocent in law as to any subsequent contingencies, but the pardon does not annihilate the fact that he was guilty of the offence. The pardon indeed proceeds upon the theory that the party was guilty in fact. The asking for it is an admission of guilt, and the granting of it is a recognition of the fact of guilt.<sup>1</sup> Thus *held* that the President could not, by a pardon, remove the charge of desertion from the record of a former soldier, who had long since become a civilian by reason of the muster-out and non-existence of the volunteer army to which he had belonged in the war of the rebellion; and that the effect of his pardon would not be to give him an honorable discharge. A pardon would not only not remove a charge of desertion, but would in fact confirm it, and constitute an additional reason for retaining it on the record. And a party cannot, by an executive act, be discharged from the service unless he is *in* the service. 1, 395, *June, 1886*; 42, 406, *August, 1890*; 43, 36, *September, 1890*; 48, 232, *July, 1891*; Cards 3125, *April, 1897*; 3794, 3810, *January, 1898*.

1880. Where it was proposed to authorize and direct the Secretary of War, by act of Congress, "to revoke and set aside the proceedings had by a court-martial \* \* \* during the month of November, 1865, and to remit the sentence promulgated thereunder by order of April 13, 1866," *held* that it was beyond the constitutional power of Congress to thus invest the Secretary of War with the pardoning power and to extend it to a sentence long since carried into execution. The pardoning power of the President can neither be added to nor detracted from by legislation, and it has been repeatedly held with reference to this power that it cannot reach an executed sentence. It must be therefore beyond the authority of Congress to vest in a subordinate official a power to pardon, which the constitutional pardoning power cannot exercise. Congress cannot in this or any other way undo the executed judgment of a court martial. 51, 357, *January, 1892*.

1881. A pardon by the President will reach and remove a continuing disqualification or disability incident upon the commission of an offence against the United States, or upon a conviction by a United States court or a court martial, but a disqualification incident under the laws of a *State*, to a conviction of an offence (no reference being made in said laws to convictions by courts martial) would not apply to a conviction of that offence by a court martial of the United States. LVI, 628, *September, 1888*.

1882. *Held* that a withdrawal by a department commander of a

<sup>1</sup>See *Ex parte Garland*, 4 Wallace 331, *Knott v. U. S.*, 95 U. S., 153, *In re Spencer*, 5 Sawyer, 105 || Federal Cases, No. 13,234. See §§ 1272 and 1273, *ante*.

pending charge against a soldier, upon his giving a pledge to abstain in the future from the conduct which was the subject of the charge, did not operate as a pardon and could not be pleaded as such. Had it been done by an order of the President, it could have had no further operation than as a *quasi* conditional pardon, leaving the charge legally renewable upon a repetition of the offence. 35, 423, *October, 1889*.

1883. The reappointment to the army of a dismissed officer does not operate as a condonation. The dismissal remains a dishonorable separation from the service. Card 2893, *January, 1897*.

#### PATENT.

1884. The presumption in favor of the validity of a patent, arising from the action of the authorities in granting it, can be overcome only by reliable and certain proof.<sup>1</sup> The grant of letters patent is *prima facie* evidence that the patentee was the first inventor of the device described in the letters, and of its novelty.<sup>2</sup> So, *held* that a claim by a patentee for a reasonable royalty for the use of his patent by the United States was not impugned by the affidavits of a third party to the effect that he was the real inventor, when such party had taken no action to contest the issuance of the patent nor resorted to the courts for his legal remedies. 53, 416, *May, 1892*. The use of a patent with the knowledge and consent of the patentee is an implied promise or agreement to pay for the same.<sup>3</sup> Card 725, *December, 1894*.

1885. An existing royalty on a patented article is in the nature of a legal lien upon it, to be paid off before it can be safely used, and is also an element properly entering into the price to be paid for it, if purchased. The article is in law sold subject to this claim. So, *held* that the United States, in purchasing a patented article, as being necessary to the due prosecution of a certain work provided to be done by an appropriation act should justly pay a price estimated by the intrinsic value of the article, augmented by the probable amount of the royalties likely to accrue as income. 44, 358, *December, 1890*.

1886. An invention is property though it be not patented, and an injunction will be granted to restrain an infringement though the patent has been merely applied for. Thus it is safer for the United States not to purchase the right to use an invented article from any person other than the inventor, since a liability to the latter might thus attach.<sup>4</sup> 43, 264, *October, 1890*. *Held* that, should the Government make a purchase—from a person other than the inventor but claiming to be such—

<sup>1</sup> *Osborne v. Guzman*, 31 Fed. Rep. 402. <sup>2</sup> *McKeever v. U. S.*, 18 Ct. Cl. 757.

<sup>3</sup> *Cantrell v. Wallick*, 117 U. S., 696.

<sup>4</sup> See *James v. Campbell*, 104 U. S., 356.

of telephones, the sale of which had been enjoined by the real patentee, the United States would be liable to him in damages, whether or not the fact of infringement or illegal sale was actually known at the time of the purchase. 57, 297, *January, 1893*. The Government becomes a tort-feasor in permitting the use in its service of an infringed patent.<sup>1</sup> Card 725, *December, 1894*.

1887. *Held*, on the authority of the ruling of the Supreme Court in Major Burns' case,<sup>2</sup> that Capt. E. L. Zalinski, 5th Artillery, was entitled to compensation for the use by the United States of his patented pneumatic gun. 31, 106, *March, 1889*.

1888. The assignment to the United States of a patent right, for use in the public service, does not preclude the assignor from also assigning the right to a foreign government, provided the original assignment were not absolute in its terms. A sale of patent right for use in one district is not incompatible with a sale for use in another, such sales being in the nature of independent licenses. But, as a general rule, the United States should accept in such a case nothing short of an absolute assignment. 64, 214, *June, 1892*.

1889. The United States cannot be sued in the courts for the profits accruing to it by reason of the manufacture and use of a patented article, unless there is either an express or implied contract for such manufacture and use; nor, where the article is being manufactured under the direction of the War Department, has that department jurisdiction over such a claim. In the absence of such jurisdiction, the claim cannot be said to be "pending" in that department within the meaning of section 12, of the act of March 3, 1887. Card 3392, *July, 1897*.

1890. The United States should not refrain from purchasing necessary supplies simply because there might be involved in the transaction an infringement of some one's patent. In such a case, however, a bond should be required to indemnify the United States against any loss it might sustain on account of possible infringement of patents in the use of the article purchased. Card 4558, *July, 1898*.

1891. While it is clearly a violation of law (act of February 18, 1893, 27 Stats., 461) for the inventor of a device (range finder) considered and adopted by the Board of Ordnance and Fortification "to be a member or serve on said board", the act does not, where he has in fact so served, prohibit the purchase of the instrument invented by him. It merely affects his eligibility for membership of or service on the board. Card 6941, *August, 1899*.

<sup>1</sup> See *Schillinger v. U. S.*, 155 U. S., 163.

<sup>2</sup> *U. S. v. Burns*, 12 Wallace, 246.

## PAY ACCOUNT.

1892. An officer's "pay account" is not commercial paper, but, in its legal aspect, a mere receipt.<sup>1</sup> So held that a *bona fide* assignee of an officer's pay account for a certain month, who, on receiving payment thereon from a paymaster, delivered to the latter the account with his name written on the back of the same, did not thereby incur the obligation of an *endorser*, or render himself liable as such for the amount to the paymaster, on its being ascertained that the officer had already himself drawn his pay for that month, and that a double payment had thus been made. XLIII, 68, *October, 1879*.

1893. Held that it was no sufficient defence to a charge, under Art. 60 or Art. 61, of duplication of a pay account, that the accused had an understanding with the first assignee that he was not to present the account assigned to him till the accused should have an opportunity to withdraw it and substitute other security. The fact that an accused assigns a second account, while the first, without the knowledge of the second assignee, is still outstanding in the hands of the first assignee, completes the offence. 50, 45, 219, *October and November, 1891*.

## PAY AND ALLOWANCES.

## I—IN GENERAL.

1894. Pay is the monthly pecuniary compensation of officers and soldiers of the army,<sup>2</sup> as fixed by Secs. 1261, 1280, &c., Rev. Sts. It is quite distinct from "allowances."<sup>3</sup> A sentence forfeiting pay does not affect allowances or *vice versa*. II, 193, *April, 1863*; VIII, 578, *June, 1864*; X, 565, *November, 1864*; XXXII, 41, *October, 1871*; Card. 1042, *February, 1895*.

1895. The right to pay begins and ends with the period of legal service. Except by special authority of Congress, an officer or soldier cannot be paid for military service rendered *before* appointment, enlistment or muster-in. XXXVIII, 120, *July, 1876*. A soldier, however, who, by accident or through some exigency of the service, is held to service for a period *after* the date on which his term of enlistment expired, is properly entitled to be paid for such additional period. XXIX, 424, *November, 1869*; XXXVIII, 662, *July, 1877*. So, a soldier, detained in the service, after his term of enlistment has expired, by reason of the pendency of proceedings under charges pre-

<sup>1</sup> Note in this connection the opinion of the Attorney General, in 16 Opins., 191, to the effect that an approved account or voucher issued to a contractor for an amount due him under his contract is "not in any proper sense negotiable paper."

<sup>2</sup> "It is the intention of the law" (see Sec. 1180, Rev. Sts.) "that the pay of the army should not be in arrears more than two months." 15 Opins. At. Gen. 209.

<sup>3</sup> See 10 Opins. At. Gen. 285, *McNaghten, 27*.



ferred against him, and who, upon trial, is acquitted, or sentenced to a punishment not including forfeiture of pay, and is thereupon discharged, —is entitled to be paid up to the date of discharge. XXI, 448, *June, 1866*. An officer separated from the service by dismissal, being dropped for desertion, "wholly" retired, or by acceptance of resignation, is entitled to be paid up to the day on which he personally receives official notice of the order or act thus detaching him from the army and making him a civilian. XXVIII, 423, 426, *March, 1869*; XXX, 549, *August, 1870*. An officer or soldier cannot be dismissed, discharged, or mustered out as of a prior date, with the effect of depriving him of pay accrued between that date and the date of the actual discharge, &c.<sup>1</sup> XVI, 406, *July, 1865*; XXII, 506, *December, 1866*.

1896. While he remains in the military establishment, an officer or soldier, whether or not actually performing military service, can be deprived of his legal pay, only through a duly adjudged and approved sentence of courtmartial, or by the operation of law under some express statutory enactment or army regulation.<sup>2</sup> The fact that an officer or soldier is under charges, in arrest, or waiting sentence, cannot (except in so far as his case may be within the application of army regulations, see § 1902, *post*) affect in any manner his right to the regular pay of his rank.<sup>3</sup> XII, 230, *January, 1865*.

1897. A sentence expressly forfeiting all pay due a soldier applies only to pay due him under his pending contract. It will not affect pay which may be due for service rendered under a previous enlistment and not yet settled. XIV, 371, *April, 1865*; XLII, 73, *December, 1878*.

1898. A dismissal of an officer by order of the President does not involve a deprivation of any part of the pay due him, and if the order is so expressed as to dismiss him "without pay or allowances," or in terms to that effect, it is, as to this portion, unauthorized and inoperative. X, 216, *August, 1864*; XLII, 73, *December, 1878*; 470, *January, 1880*. So where a legal muster into service of a volunteer officer was revoked by order, after an interval of service rendered, with the effect (given to the order) of depriving him of pay for such service, held that the so-called revocation was unauthorized and inoperative. A

<sup>1</sup> See *Allstaedt v. United States*, 3 Ct. Cls. 284; 7 Comp. Dec. (dated March 16, 1901). See §§ 1848 and 1849, *ante*. On the other hand, where an officer, who has been dismissed, is restored (by the authority of Congress) to office with the rank which he had when dismissed, or other rank of a date prior to the restoration, he is not thereby entitled to back pay. In such cases, in the absence of any grant of pay in the statute, "the relation back is for rank only, not pay." 4 Opins. At. Gen., 603; 5 *id.* 101, 132; 9 *id.* 137.

<sup>2</sup> See, to the same effect, the opinion of the Attorney General in 15 Opins. 175, and, on the general principle that pay cannot be forfeited by implication, see § 1380, *ante*.

<sup>3</sup> See § 500, *ante*.

legal executive act cannot be thus nullified to the prejudice of a vested right. XLII, 470, *supra*.

1899. An officer or soldier cannot be deprived of his pay by means of any civil process of attachment or levy on execution. So where a wife, in an action of divorce against her husband, a captain in the United States service, obtained an interlocutory judgment for an allowance *pendente lite*—*held*, that there was no precedent or legal ground for requiring him to satisfy the amount of such judgment out of his pay. VIII, 493, *May, 1864*.

1900. The Secretary of War is without authority to appropriate or stop an officer's pay for the use of his family, or to satisfy a judgment or decree of a civil court growing out of an obligation of a private character. But he may of course cause such officer to be brought to trial by court martial for dishonorable conduct in the treatment of his family or with respect to the obligation referred to. Cards 3500, *September, 1897*; 3819, *January, 1898*; 5452, *December, 1898*; 6882, *August, 1899*. Nor in the case of a retired officer, alleged to be irresponsible, has the Secretary of War authority to designate a person to receive and distribute such officer's pay. In such case, the appointment of a guardian by the proper court should be secured by the parties interested. Card 4636, *July, 1898*.

1901. By operation of law, indeed, under certain express statutory provisions, an officer's or soldier's pay may be withheld altogether, or temporarily, or be subjected to certain charges and thus reduced. Thus, by Sec. 1265, Rev. Sts., an officer absent without leave forfeits all pay during the period of his absence, unless the same be excused as unavoidable. By Sec. 1266, an officer dropped from the rolls for an unauthorized absence of three months is required to "forfeit all pay due or to become due." Sec. 1706 prohibits the payment of his compensation to any person while he continues "in arrears to the United States." Secs. 1303 and 1304 require in effect that the cost of damage done to arms, &c., and the value of military stores found deficient, shall, except where the loss is occasioned by no personal fault of the party, be charged against the pay of the officer or soldier responsible for the damage or deficiency. XLI, 156, *March, 1878*.

1902. So, by pars. 132 and 1514, Army Regulations (132, 133, and 1381 of 1895),<sup>1</sup> it is directed that no enlisted man shall receive pay or allowances for any time during which he has been absent without leave; and, further, that a deserter shall forfeit all pay and allowances due him at the time of his desertion. These forfeitures are incurred by operation of law, upon the commission of the offence, independently of any punishment for the same by sentence of court martial, and it is not essential to their taking effect that the offence should have been

<sup>1</sup> See pars. 143, 144, and 1558, A. R. of 1901.

found by a military court. In general, however, they cannot safely be enforced in the absence of an ascertainment of the guilt of the party by a trial and conviction. Only such pay is affected by these regulations as is expressly specified therein. Thus a deserter forfeits both pay due at the time of his offence and pay for the period of his unauthorized absence, so that, upon his apprehension or surrender, nothing whatever is due him. But here the forfeiture by operation of law ends; from this date his pay begins to run anew; and unless his sentence (in the case of his trial and conviction) includes a forfeiture of pay due, he will be entitled to his pay (less any legal stoppages or deductions) from such date (which is considered to be that of his return to service) to the date of his discharge, whether this be a dishonorable discharge adjudged by the sentence and executed forthwith, or—the sentence not imposing such punishment—an honorable discharge given him in the usual manner after a further period of service. VIII, 650, *July, 1864*; XXI, 433, *June, 1866*; XXIII, 160, *August, 1866*; XXIV, 26, *November, 1866*; XXXIX, 369, *December, 1877*. A. R. 129 (140 of 1901) indeed provides that this pay shall not be rendered to him prior to trial, but it does not affect his right to receive it when the trial is completed, and it is found not to be forfeited by the sentence of the court. XXI, 433, *June, 1866*. So clothing allowance accruing to him from the date of his surrender or delivery to the military authorities is not forfeited, unless the sentence so provides. Card 4987, *September, 1898*.

1903. An officer or soldier brought to trial for desertion, and convicted of absence without leave, but whose conviction has been *disapproved* by the competent reviewing authority, cannot be subjected to any of these forfeitures. VIII, 519, *June, 1864*. A full acquittal of desertion includes, of course, an acquittal of the offence of absence-without-leave included in the desertion. XXXVII, 509, *May, 1876*. So far as any military offence involved in the matter is concerned, the soldier's record is absolutely clean, but if it duly appears on the proper rolls that he was in fact absent without authority through his own fault during the period of the alleged desertion, there has been a breach of contract on his part, due to his failure to furnish the service which he contracted to furnish. The pay and allowances that accrued during such unauthorized absence should therefore be withheld from him.<sup>1</sup> Card 1494, *June, 1895*.

<sup>1</sup>When the proceedings of a court martial are disapproved by the reviewing authority, the soldier cannot legally be subjected to the forfeitures attached to the crime with which he is charged. In cases of deserters [whose convictions (sentences) have been disapproved] the charge of desertion will be removed, the fact of absence from the service, however, remains, and the soldier should not be paid for the period during which he was absent, and should make good the time lost, as required by par. 217, A. R. of 1881 (142 of 1901). Circular 2, A. G. O., 1885.

1904. A captain having been mustered out of the service, as a supernumerary, with one year's extra pay and allowances, according to the provisions of sec. 12 of the act of July 15, 1870, was (after more than two years) reappointed as a second lieutenant, and thereupon required to submit to a stoppage against his pay, as such lieutenant, of the said extra pay. The Attorney General having subsequently decided that this requirement was unauthorized in law,<sup>1</sup> Congress was induced to pass an act approved March 3, 1875—specifically providing that officers mustered out as supernumerary should be required, upon re-appointment, to refund the one year's pay rendered to them upon the muster-out. *Held*, under this act—1st, that it applied only to future cases, *i. e.* to cases of officers who should be so re-appointed after its date (XXXVI, 355; *April, 1875*); 2d, that it applied only to officers mustered out as supernumerary under sec. 12 of the act of 1870, and not to officers honorably discharged upon their own application by the authority of sec. 3 of the same, these latter constituting a separate and distinct class from the supernumerary officers.<sup>2</sup> XXXVII, 650; *June, 1876*.

1905. It is within the authority of Congress to *reduce* the pay or allowances of officers or soldiers at any time during their period of service or enlistment. XXXII, 611, *May, 1872*. But this of course cannot be done by military or executive authority,<sup>3</sup> nor can a soldier's pay be *withheld* except in pursuance of law or sentence. Thus *held* that a commanding officer was not authorized to withhold a soldier's pay on the theory that if paid he would probably desert. XXX, 356, *May, 1870*.

1906. *Held* that an officer ordered to his home to await orders did not occupy the status of an officer on leave of absence, and was not therefore on half pay during the period of thus awaiting orders, but was entitled for such period to the full pay of his rank.<sup>4</sup> XXXI, 599, *August, 1871*. An officer relieved from duty and placed on "waiting orders," by the direction of the Secretary of War, is not liable to loss of pay by reason of such status. 63, 106, *December, 1893*.

1907. *Held* that Sec. 1262, Rev. Sts., in providing for a certain

<sup>1</sup> 14 Opins., 230.

<sup>2</sup> See the confirmatory opinion of the Attorney General, in 15 Opins., 177.

<sup>3</sup> "It is not within the power of the executive department, or any branch of it, to reduce the pay of an officer of the army." *United States v. Williamson*, 23 Wallace, 416.

<sup>4</sup> This opinion was affirmed, in the same case (*United States v. Williamson*) by the Court of Claims, in 1873 (9 Ct. Cls., 503), and by the Supreme Court, in the next year (23 Wallace, 411). But in *United States v. Pinetiger*, 1 Otto, 219, it was held that an officer, ordered to his home to await orders, was not entitled to *commutation for quarters and fuel*, his home not being a "station" in the sense of par. 1080, Army Regulations. See G. O. 78, Hdqrs. of Army, 1877, issued in consequence of this decision. But see the case of *United States v. Lippatt*, 10 Otto, 693, where the officer was ordered to the *headquarters of a military department*, to await orders.



increase of pay for officers on account of duration of service, referred to service in the army, and that a period during which a certain officer had served in the navy could not legally be included in computing his years of service under this statute. XLI, 234, *May, 1878*.

1908. *Held* that *medical cadets*,—in view of the terms of the statute (act of Aug. 3, 1861, c. 42, s. 5), authorizing their employment in the military service,—though not private soldiers or non commissioned officers, were clearly enlisted men; and therefore that officers now in the army who had served as medical cadets during the war were entitled, under the provisions of sec. 7 of the act of June 18, 1878, to compute the period of such service in computing their "service" or "longevity" pay under Sec. 1262, Rev. Sts. XLIII, 196, *February, 1880*.

1909. The act of July 17, 1862, c. 200, s. 1, allowed to officers assigned to duty which required them to be mounted certain increased pay. So, Sec. 1261, Rev. Sts., entitles captains and lieutenants, when "mounted," to receive respectively two hundred and one hundred dollars per annum of pay more than when "not mounted." *Held* that, to entitle officers to the increase of pay under these statutes, it was not, and is not, essential that the duties required of them should make it absolutely necessary that they should be mounted; but that it was, and is, sufficient if these duties were, or are, such as are usually and appropriately performed by mounted officers, and such as can not be performed effectively or without material embarrassment and inconvenience to the service except by such officers;<sup>1</sup> and further that the certificate of the proper commander of an officer (as of the Chief Signal Officer in a case of an officer engaged in signal duty, or of the Superintendent at West Point in a case of an acting quartermaster stationed at that post) that the duties of the officer properly required (in the sense above indicated) that he should be mounted, would (the Secretary of War approving) be sufficient to entitle him to receive the additional pay.<sup>2</sup> XXVI, 678, *July, 1868*; XXI, 59, *June, 1869*. *Held* that a captain or lieutenant, not mounted, detailed as a professor in a college under Sec. 1225, Rev. Sts., was not entitled to mounted pay. XXXIX, 475, *March, 1878*. Similarly *held* with respect to such officer when on duty as Indian agent under the act of June 13, 1893.<sup>3</sup> Card 1483, *June, 1895*.

1910. Sec. 1261, Rev. Sts., in fixing the pay of officers, provides that

<sup>1</sup> Note, in this connection, the construction, in *Grissold v. Hepburn*, 2 Duvall, 20, of the provision in Art. I, Sec. 8 clause 18, of the Constitution, that Congress shall have the power "to make all laws which shall be necessary," &c., for the execution of its special powers—as meaning not indispensable but appropriate and conducive to the purpose.

<sup>2</sup> See the recent G. O. 146, A. G. O., 1890, as to officers entitled to mounted pay.

<sup>3</sup> See Circular 19, A. G. O., 1893.

an "acting assistant commissary" shall be paid "one hundred dollars a year in addition to the pay of his rank." The statute does not prescribe that the officer thus "acting" shall have any particular rank, nor is there any such an office in the army as "assistant commissary." *Held* therefore, that "acting assistant commissary," as here used, was a name for, or description of, a *duty*, not an office; that a captain was as legally eligible to be detailed on the duty of an acting assistant commissary as was a lieutenant; and therefore that a certain captain who had been thus detailed was entitled to the additional pay specified by the statute. XLI, 217, *April, 1878*.

1911. *Held* that the additional pay upon re-enlistment, accorded to soldiers by Sec. 1284, Rev. Sts., was intended as a compensation for long and continued military service, without reference to the kind of service or the corps in which it was rendered; and therefore that, where this additional pay had once begun to accrue to a soldier by reason of his having entered, in accordance with the provisions of the section, upon a second term of five years' service in the infantry, his continued right to the same was not interrupted by his being discharged from the infantry and (on the next day) enlisted in the ordnance corps. XLII, 283, *May, 1879*. But service as an officer of volunteers cannot be computed as continuous service within the meaning of Sec. 1284, Rev. Sts., that statute contemplating service as an enlisted man and not as a commissioned officer. Card 6039, *March, 1899*.

1912. Secs. 1282 and 1284 Rev. Sts., as amended by the act of August 1, 1894 (28 Stats., 215), prescribe that the enlistment shall be within three months after the discharge to entitle the soldier to the continuous service pay provided for therein. *Held* that this term cannot be legally extended by the executive authorities for any cause whatever. Card 6120, *March, 1899*.

1913. Sec. 1305, Rev. Sts., provides for the deposit by an enlisted man of his savings with a paymaster, to be paid over to him upon discharge. *Held* that this statute provided for voluntary deposits only; and that an officer, however laudable his motive, was not legally authorized in thus depositing, against the will of a soldier, certain money in his hands belonging to the latter. XXXIX, 471, *March, 1878*. Nor can a court martial legally sentence a soldier to "deposit" any part of his pay. 32, 252, 253, *May, 1889*; 34, 22, 124, *July, 1889*.

1914. A soldier in confinement awaiting the result of his trial by court martial was, contrary to par. 945, A. R. (1046 of 1901), paid one month's pay, which, in compliance with instructions, he delivered to the officer of the day, who turned it over to the adjutant of the post. The latter delivered it to a paymaster with the statement that at the time of payment the prisoner was "awaiting result of trial." The pay-

master deposited it to the credit of the Treasurer of the United States. *Held* that upon payment to the soldier the title to the money vested in him, and *advised* therefore, that his application for reimbursement be referred to the Auditor for the War Department. (Card 3258, *June, 1897.*

1915. *Held* that an officer on the active list,<sup>1</sup> detailed as a professor in a college under Sec. 1225, Rev. Sts., though detailed at his own request, was entitled to the usual *allowances* of officers on duty, *viz.*, the allowance for commutation of quarters made payable by sec. 9 of the act of June 18, 1878, c. 263, "at places where there are no public quarters," and the right to purchase fuel on the terms accorded by sec. 8 of the same act.<sup>2</sup> XXVII, 662, *May, 1869*; XXXIV, 365, *July, 1873*; XXXIX, 475, *March, 1878.*

1916. *Held* that, while engineer officers engaged upon civil works were entitled, like other officers on duty, to the allowances authorized by secs. 8 and 9 of the act of June 18, 1878, no part of the appropriations specially made for such works by Congress could, in the absence of express statutory authority for the purpose, be devoted to the purchase of fuel for such officers or to the payment to them of the commutation allowance for quarters. XLI, 346, *July, 1878.*

1917. Sec. 8 of the act of June 18, 1878, authorizes the furnishing of fuel to officers at a certain rate "according to the regulations now in existence."<sup>3</sup> *Held* that an officer, while absent on sick leave, was not entitled to the benefit of this provision.<sup>4</sup> XLI, 382, *September, 1878.*

1918. The act of June 18, 1878, c. 263, s. 8, provides that "fuel may be furnished to the officers of the army by the Quartermaster's Department for the actual use of such officers only," &c. *Held*, that it would not be in contravention of this statute to furnish to the *families* of officers, temporarily absent by authority, though not on formal leave, from their stations, the allowance of fuel to which they were entitled (*i. e.* the fuel which they were allowed to purchase at a

<sup>1</sup> See 16 Opins. At Gen., 92, to the effect that *retired* officers are not entitled to the right to purchase fuel under the act of June 18, 1878.

<sup>2</sup> Compare *Long v. United States*, 8 Ct. Cls., 398.

It has been held by the Attorney General (16 Opins., 311) that the term of description in sec. 9 of the act of June 18, 1878,—"at places where there are no public quarters," included places where the public quarters were insufficient for all the officers of the command; and that officers, stationed at such places, to whom, on account of the insufficiency of the existing accommodations, no quarters could be furnished, would be entitled to the commutation allowance.

<sup>3</sup> It has been held by the Attorney General (16 Opins., 92) that the words in this section—"at the rate of three dollars per cord for standard oak wood, or at an equivalent rate for other kinds of fuel, according to the regulations now in existence," were to be construed as only authorizing the Quartermaster Department to furnish the quantity of *other* fuel for three dollars which, by the regulations, is made the equivalent of a cord of standard oak wood.

<sup>4</sup> See A. R., 908 of 1895 (1101 of 1901).

reduced rate under the act);—articles of necessity furnished for the use of an officer's family under the circumstances being in contemplation of law furnished for the use of the officer himself. XXXIX, 638, *August, 1878.*

1919. *Held* that the right of an honorably discharged soldier to the "travel pay," or allowance for transportation and subsistence, while proceeding from the place of his discharge to the place of his enlistment, as accorded by Sec. 1290, Rev. Sts., was not divested by a sentence of court martial imposed upon him before discharge by which were forfeited, with pay, his "allowances due and to become due"; this term referring to his regular allowances as a soldier, and not including the allowance in question which is made to the soldier after he has become a civilian. XXXVIII, 172, *July, 1876.*

1920. Sec. 2 of the act approved March 2, 1899, provides that "each regiment of cavalry shall consist of \* \* \* two veterinarians \* \* \* *Provided, \* \* \** Of the veterinarians provided for in this act, one shall have the pay and allowances of a second lieutenant of cavalry and one shall have the pay of seventy-five dollars per month and the allowances of a sergeant major." Veterinarians under this act are appointed by the Secretary of War, and their allowances are fixed by the statute (saves to money allowances of clothing for junior veterinary surgeons as provided in Army Appropriation Act approved May 26, 1900). While traveling under proper orders veterinarians of the second class should be furnished with transportation requests and given commutation of rations, being governed by the same rules as in case of a sergeant-major. A veterinarian of the first class traveling under proper orders without troops should receive mileage the same as a second lieutenant.<sup>1</sup> Card 8587, *July, 1900.* The language of the act quoted should be construed as placing the veterinarian of the first class on the same footing with the second lieutenant of cavalry as to pay and allowances of every kind. *Held* therefore that he was entitled to the change of station allowance of a second lieutenant of cavalry. Card 7111, *October, 1899.*

1921. During the war with Spain an enlisted man of the regular army was given a commission as an officer of United States volunteers and at the same time a furlough as enlisted man "to last during the war." While serving as such officer his term of enlistment expired and he was discharged accordingly, but remained in the service as an officer of volunteers. *Held* that his case did not differ from that of a soldier discharged to accept a commission; that he was therefore not entitled to travel allowances on his final statements; but that

<sup>1</sup> Concurred in by the Comptroller under date of July 21, 1900.



when discharged as an officer he would be entitled to travel pay as such. Card 5953, *March, 1899*.

1922. The Treasury Department will not pay the claims of creditors of a soldier out of money due him at the date of his death. The way for them to obtain payment is to have letters of administration taken out and prove their claims before the administrator, to whom the Government would pay the amount due the estate.<sup>1</sup> Card 2779, *December, 1896*.

## II—PAY OF OFFICERS.

1923. Sec. 1268, Rev. Sts., requires that officers shall be paid monthly, and Sec. 3648, Rev. Sts., in effect forbids their being paid in advance. Their right, however, to assign their monthly pay, when duly accrued, has long been admitted.<sup>2</sup> The prohibition, by Army Regulations, of the transfer of pay accounts before they are due implies the right to transfer them when or after due. L.V. 251, *December, 1887*. The pay of an officer authorized to receive it can be paid, by a paymaster, only to the officer himself or his proper assignee. Where two or more persons produce assignments of an officer's pay, or of a portion or portions of the same, the paymaster should refuse to pay at all. The Government cannot undertake to decide such controversies. 21, 281, *December, 1887*.

1924. Par. 1442, A. R. (1889), prescribes in effect that "troops at posts and in the field" shall be paid personally and in cash. This, however, is directory merely. If the Pay Department is unable at any time to effect such a payment, and the troops at a post are willing to accept checks sent by mail, a payment made in this manner will be legal, and no liability will be incurred by the paymaster except that of properly making out the checks and duly depositing them in the mail properly addressed. 48, 8, *June, 1891*.

1925. The additional pay, payable under Sec. 1261, Rev. Sts., to aids-de-camp and infantry officers on mounted duty, is a part of their regular pay as such—as much a part of their legal compensation as the pay attached to their grade. It therefore needs no special appropriation to authorize its payment, but it is payable under the general clause of the army appropriation "for pay of officers of the line." &c. 54, 468, *August, 1892*; 59, 228, *May, 1893*.

1926. *Held* that an infantry officer, detailed under the act of August 5, 1892, "for special duty in connection with the World's Columbian Exposition," was not entitled to receive *mounted* pay; the act expressly providing that no officer or employee of the United States

<sup>1</sup> See 2 Comp. Dec. 226.

<sup>2</sup> 15 Opins. At. Gen., 271.

should receive any "additional pay or compensation because of service connected with said exposition." 55, 495, *October, 1892.*

1927. The "advances" which may be authorized by the President to "persons in the military and naval service" under Sec. 3648, Rev. Sta., when made to officers, are not payments to them in advance but are merely transfers to them of the funds with which to pay their monthly pay as it falls due.<sup>1</sup> Where, therefore, an officer, to whom an advancement covering several months had been duly ordered, transferred his pay accounts for those months prior to his departure to a distant station to another officer, *advised* that the order be so changed as to have the advancement made to the latter officer. Having the pay accounts in his possession already executed, he could pay them as they fell due and thus account as a disbursing officer for the whole amount. Card 3736, *December, 1897.* The advances which the President may direct under this statute are limited to persons in the military and naval service, and therefore cannot be authorized in the case of a civilian clerk in the employ of the Government. Card 3809, *January, 1898.*

### III—PAY OF ENLISTED MEN.

1928. *Held* that an enlisted man had no claim for his pay for a period during which he was detained by the civil authorities in arrest and for trial, although his offence was shown to have been a slight one and he was convicted of an offence of much less gravity than that with which he was charged.<sup>2</sup> 38, 154, *January, 1890.*

1929. *Held* that the Army Appropriation Act of Feb. 27, 1893, in changing and fixing the pay of first sergeants and sergeants, had reference to those of the line of the army, and did not include sergeants of the engineer or ordnance corps. 59, 80, *April, 1893.*

1930. A soldier discharged "without honor," on account of fraudulent enlistment, is not entitled to pay accrued before such enlistment was discovered and he was discharged.<sup>3</sup> 63, 436, *February, 1894.*

1931. Two discharged soldiers were brought to trial under the last clause of Art. 60, and one was acquitted, and the other was convicted but his sentence was disapproved. They applied for pay for the period spent in confinement awaiting trial and final action. *Held* that there was no law authorizing their being paid for such period. 68, 178, 179, *January, 1894.*

<sup>1</sup> 4 Comp. Dec., 250.

<sup>2</sup> As to the "pay status of (officers and) enlisted men withdrawn from duty by arrest and confinement by the civil authorities," see A. R., 2399 of 1881; G. O., 46, A. G. O., 1891, and A. R., 1311 of 1895 (1894 and 1901).

<sup>3</sup> But that he cannot legally be required to refund money paid for service under a fraudulent enlistment, see § 1415, *ante*.

1932. Pay for certificate of merit, like pay for continuous service, has always been held to be a part of the soldier's pay and included in computation of travel pay. Card 1308, *April, 1895*.

1933. A competent court of the State of California appointed a guardian of the person and estate of a retired enlisted man of the United States Army, resident in that State, who had been duly found to be an incompetent. To avoid the order of the court the latter left the State and requested that a paymaster outside the State make payment to him. *Held* that his pay could legally be delivered to the guardian.<sup>1</sup> Card 3676, *November, 1897*.

#### IV—RETAINED PAY.<sup>2</sup>

1934. The act of June 16, 1890, in prescribing the retention of four dollars of the monthly pay of each enlisted man for the first year of enlistment, to be forfeited unless he serves honestly and faithfully to the date of discharge, provides "that the Secretary of War shall determine what misconduct shall constitute a failure to render honest and faithful service within the meaning of this act." *Held* that the Secretary was not concluded by the finding on this subject of a board of officers ordered under G. O. 56 of 1891. If not satisfied with such finding he may convene another board or he may decide the matter contrary to the view of the board. Under the act, if the usual machinery fail to secure a just and reasonable conclusion, he must determine the question for himself. 58, 23, *February, 1893*.

1935. Where a conviction and sentence for *desertion* were approved but the sentence was remitted, *held* that the right of the soldier to the retained pay forfeited by the desertion was not revived. And similarly *held* where the deserter was merely restored to duty without trial under the Army Regulations; but where a sentence for desertion has been disapproved there can be no forfeiture of retained pay. 50, 121, 122, *March, 1886*.

1936. *Held* that the term—"for the first year of his enlistment," in the act of June 16, 1890, referred to the first year of an original enlistment, and did not include a case of re-enlistment; that therefore the provision of the act in regard to retained pay did not apply to the "army service men" of the Quartermaster Department at West Point, a detachment composed entirely of re-enlisted men. 47, 95, *May, 1891*.

1937. Under par. 2454, A. R. (1369 of 1895), the retained pay is forfeited by a sentence imposing dishonorable discharge, whether or not

<sup>1</sup> Concurred in by the Comptroller under date of January 8, 1898.

<sup>2</sup> Retained pay was abolished by act of March 16, 1896 (29 Stats., 60).

there be an express forfeiture of such pay added in the sentence. L.J. 449, *February, 1887*.

**1938.** A sentence of forfeiture of "all pay due and to become due" includes and forfeits the retained pay. 30, 415, *February, 1889*.

**1939.** *Held* that the act of June 16, 1890, s. 1, was evidently a provision in regard to soldiers as such, and did not include general service clerks and messengers or Indian scouts, whose pay was therefore not retained thereby. 42, 93, *July, 1890*.

**1940.** *Held* that the retained pay of deserters was included in the "forfeitures on account of desertion," appropriated, by Sec. 4818, Rev. Sts., "for the support of the Soldiers' Home." 60, 13; *June, 1893*; 61, 486, *October, 1893*.

#### V—ALLOWANCES OF OFFICERS.

**1941.** *Held*, that the Secretary of War was not empowered to increase the existing allowance for commutation of quarters. Congress has covered the ground and fixed the allowance—as to the number of rooms by the act of June 18, 1878, adopting the then existing regulations on the subject; and as to the amount to be paid for each room (\$12) by the act of June 23, 1879. 62, 100, *October, 1893*.

**1942.** *Held* that the regulations, pars. 1480 *et seq.*, providing for the payment of the allowance of commutation of quarters, did not extend to the case of retired officers ordered as witnesses before a court martial. Such order did not place them on duty in such a sense as to entitle them to increased emoluments. 50, 340, *November, 1891*.

**1943.** An officer of the army, acting as Indian agent, occupied as his quarters, without rent, a house at the agency, placed at his disposal for the purpose by the Interior Department. *Held* that he was not entitled to commutation of quarters. Moreover the appropriation in the Army Appropriation Act for commutation of quarters is for "officers on duty," &c., and par. 1480, A. R. (1489 of 1901), is to a similar effect. Further *held* therefore that this "duty" meant military duty, and did not include duty as an Indian agent under the act of June 13, 1893, which, in authorizing the detail of officers of the army as Indian agents, detaches them from military service and duty for the time being, and places them "under the orders and direction of the Secretary of the Interior."<sup>1</sup> 64, 121, *March, 1894*.

<sup>1</sup> See the case of *U. S. v. Dempsey*, decided Sept. 28, 1900, by the U. S. Circ. Court, D. Montana (104 Fed. Rep., 197), in which the court held—

1. That under par. 1480, Army Regulations, which provides that "officers on duty, without troops, at stations where there are no public quarters, are entitled to commutation therefor", any suitable quarters provided by the Government for the use of an officer answer the requirement for "public quarters," though not expressly built for army officers, and an officer assigned to duty as an Indian agent, and fur-



1944. In view of the provisions of successive appropriation acts impliedly restricting the selling by the United States of material for fuel and light, to sales to "officers," and of the previous practice to the effect in the War Department, *held* that such sales should not be permitted to be made to other classes of persons until Congress shall have so authorized. 58, 470, *April, 1893*.

1945. *Held* that an officer who applied for and procured to be terminated a temporary status of detached service on which he had been placed, and thereupon rejoined his station and regiment, did not, properly speaking, effect a change of station at his own request in the sense of par. 1475, A. R. (1889), and should not therefore be denied the usual mileage and cost of transportation. 62, 152, *October, 1893*. An officer whose battery was ordered to change station, was duly authorized, on account of sickness in his family, to delay changing and joining the battery for some sixteen days. *Held* that he was entitled, on thus joining his battery at the new station, to be paid the usual traveling allowances. He might be viewed as duly complying with the original order, not indeed on the day named but after a reasonable delay acquiesced in by his proper military superiors. Or, if viewed as on leave during the period of delay, he would be entitled to the allowance under par. 1474, A. R., as amended by G. O. 55 of 1891; the leave merely suspending a right which was revived on its expiration. 60, 436, *July, 1893*.

1946. An officer, only a few days before the expiration of a two months' leave of absence, was placed on a duty which kept him on duty an entire month beyond the end of his original leave, and was then ordered to rejoin his station. To hold that he then reverted to the status of being on leave would be too technical and not reasonable. The order should be treated like any other order involving return travel after performance of duty and be held to authorize the allowance of the usual mileage and cost of transportation. 58, 475, *April, 1893*.

1947. By an order of the President, of 1892, a special command, independently of any department commander, of all troops on escort duty with the International Boundary Commission, was devolved upon a lieutenant colonel of engineers. *Held* that his order, requiring travel on duty by an officer of the command, entitled such officer to the usual

nished a suitable building on the reservation for his quarters, without charge, is not entitled to receive commutation for quarters.

2. That where an army paymaster has paid an officer a sum as a commutation allowance through an error of law, the United States is not bound by such payment, and may recover the money so paid in a proper action, with interest from the date when the officer's accounts were settled by the Treasury Department, at the rate established by the laws of the State in which the action is brought, citing in support of the latter, *McElrath v. U. S.*, 102 U. S., 441; *Wisconsin Central R. Co. v. U. S.*, 164 *id.*, 190.

*travel allowances*, equally as would a similar order issued by a department commander. 57, 357, *January, 1893*.

1948. In view of the transfer of the meteorological service from the War to the Agricultural Department, *held* that an officer of the army, on temporary duty to assist the Secretary of Agriculture in initiating the service in his department, under the act of Congress making the transfer, could not be ordered from Washington on meteorological duty at San Francisco, under a military order in the nature of an order changing station, with the effect of entitling him to the statutory travel allowances. Such an order, being one on *civil* service, would not cover a military allowance, and could not legally be issued. 53, 83, *April, 1892*. Also, *held* that an order relieving a lieutenant of the army from temporary duty with the Weather Bureau of the Agricultural Department, and directing him to join his post and company, did not, in a military sense, effect a change of station in his case, and that he was not therefore entitled to change of station allowance of baggage from Washington to such post. 57, 273, *January, 1893*.

1949. The act of August 15, 1876, "to regulate the use of artificial limbs," provides that "necessary transportation, to have artificial limbs fitted, shall be furnished," &c., and this part of the act is still in force. In 1885 the Secretary of War construed this act as contemplating and including "sleeping car accommodations on occasion of night travel." Under the existing law, officers on the active list, traveling on duty, are not entitled to be reimbursed the cost of such accommodations, being expressly disallowed sleeping car and parlor car fare by the statute. But *held* that the cases of disabled officers (and soldiers), obliged to resort to artificial limbs, were not necessarily governed by the statutory provisions restricting the travel allowances of active officers, and that, as the law on the subject has not been changed since the construction referred to, the same may properly be regarded as still controlling, and the cost of sleeping berths be still allowed in these cases.<sup>1</sup> 61, 147, *August, 1893*.

1950. By an arrangement with a railway company, made with the concurrence of the quartermaster at his station, an officer, on changing station, had all his *personal baggage* transported together in a single through car. *Held* that this action might subsequently (*nunc pro tunc*) properly be ratified by the "higher authority" indicated in par. 1221, A. R. (1889), and he be reimbursed the proportion which the United States, under par. 1222, would legally have been bound to pay for the transportation of his allowance. 59, 75, *April, 1893*.

1951. *Held* that an officer duly detailed under the act of August 5, 1892, for duty in the government department of the Columbian Expo-

<sup>1</sup> The adoption of this opinion is published in Circ. No. 22, A. G. O., 1893.

sition, and continued on such duty for nearly a year, was entitled, on being ordered to the post of his company, to the allowance for transportation of baggage to which an officer is entitled, under par. 1221 or 1222, A. R., on changing station. The appropriations for such department in the acts of August 5, 1892 and March 3, 1893, cover only such items as the expenses of the transportation, preparation, installation, care and return of the exhibits, and of the employment of the necessary civilian clerks and assistants, and would not therefore apply to the payment of such an allowance. But the act of 1892 provides that officers of the army so detailed shall not be subject to any "loss of pay," and the term *pay*, as thus used, is deemed to be properly constructed as equivalent to compensation, and thus to include allowances. *Held*, therefore, that the allowance in this case was payable out of the regular appropriation for the transportation of the army. 64, 367, April, 1894.

1952. An officer was ordered from Fort Custer to Washington, D. C., to await retirement, but was not in fact retired till at the end of about five months after his arrival at Washington. *Held* that he was entitled, under par. 1169, as amended by G. O. 38 of 1890, to the regulation allowance for the transportation of his horses from Fort Custer, on the ground that he was changing station. Washington became on his arrival, and continued to be during the five months mentioned, his proper station, where he was entitled to receive the *other* allowances accruing to an officer at his station—commutation of quarters, forage, medical attendance, the right to purchase commissary stores and fuel, &c. 60, 22, June, 1893.

1953. A cavalry lieutenant, ordered from Washington to report to the Superintendent of the Military Academy for duty at the academy, *held* entitled to be reimbursed the amount paid by him for the transportation of his horse to West Point; such amount being reasonable and within the regulation limit. An assignment to duty at the academy is not a "college detail." 59, 7, April, 1893.

1954. *Held* that the regulation allowance for the the expenses of the interment of an officer, as fixed by par. 86, A. R. (as amended by G. O. 29 of 1891), was not payable in a case of an officer who at the time of his death was on sick leave, this not being one of the cases specified in the army appropriation acts (see acts of June 30, 1892 and Feb. 27, 1893), in which such allowance is authorized to be paid. 60, 47, June, 1893. Similarly *held* in a case of an officer who died at the Hot Springs, Arkansas, when not on duty but on leave of absence. 47, 25a, May, 1891.

1955. *Held* that the fact that an officer had been interred at the post

where he died did not preclude the Secretary of War from authorizing his permanent interment elsewhere, provided the entire expenses of burial did not exceed the maximum amount of seventy five dollars allowed for such purposes by par. 86, A. R., as amended by G. O. 29 of 1891. But *held* further that, under the provision on the subject of the Army Appropriation Act of Feb. 27, 1893, such expenses could not be allowed for the interment of an officer dying at a military post unless he was on duty there at the time of his death, and therefore could not legally be allowed in a case of an officer who deceased at a post where he was staying while on sick leave of absence from his station in another military department. 65, 183, *June, 1894*.

#### VI.—ALLOWANCES OF ENLISTED MEN.

1956. The commutation allowance for quarters and fuel for enlisted men has not been fixed by any general statute. Its authority is army regulation, recognized, however, and sanctioned by appropriation acts.<sup>1</sup> The subject is under the direction of the Secretary of War, who may—as he has done heretofore—change the amount, except in so far as it may be regulated by Congress. The contract of enlistment does not bind the United States to any fixed allowance, and, in the exercise of the power of amending regulations, the amount of the commutation payable to enlisted men may be reduced at the discretion of the Secretary of War.<sup>2</sup> LII, 97, *March, 1887*.

1957. Authority to establish the rates of the allowance for commutation of rations has not been given by statute, but these rates have been left to be fixed by army regulations. But these amounts are recognized and sanctioned in the provisions of the army appropriation acts relating to the Subsistence Department. 49, 441, *October, 1891*.

1958. Par. 1419, A. R. (1889), in directing that commutation in lieu of rations shall not be allowed to soldiers where subsistence in kind is provided by the Government, except cases where the same is specially authorized by the Secretary of War. *Held*, that this part of the regulations was substantially superseded by the statutory provision of the existing Army Appropriation Act of February 27, 1893, which enumerates several specific classes of enlisted men as persons to whom the payment may be made without reserving to the Secretary of War any authority to extend the privilege. 60, 445, *July, 1894*.

<sup>1</sup> See 1 Opins. At. Gen., 475, 2 *id.*, 704.

<sup>2</sup> But see the Army Appropriation Act of Feb. 12, 1895, which with respect to the appropriation for "barracks and quarters" provides that "no part of the moneys so appropriated shall be paid for commutation of fuel, and for quarters to officers and enlisted men." This provision is repeated in all the subsequent army appropriation acts to the present time (1901).



1959. The allowance for *commutation of rations*, made payable, by the Army Appropriation Act of February 27, 1893, "to enlisted men traveling on detached duty, when it is impracticable to carry rations," &c., *held* to be restricted to the period covered by the travel, and not to be payable to a soldier for commutation of rations consumed at the destination where he was placed by his orders on detached duty, *viz.*, for four days board at a hotel at the terminus of his travel. 59, 38, *April, 1893.*

1960. The men enlisted as general service clerks, specified in the Army Appropriation Act of June 30, 1886, are provided to be paid a certain fixed compensation, which, it is prescribed, shall be "in full for all pay, commutations, and allowances." *Held*, that they could not legally be allowed commutation for rations. LIII, 75, *October, 1886.*

1961. Where a sentence forfeits "all pay and allowances" for a certain period, the necessary clothing may be supplied under the provisions of A. R. 1294 (1193 of 1895; 1317 of 1901). All prisoners in the manual custody of the authorities, civil or military, are entitled to subsistence during their detention and it cannot be forfeited by sentence. 62, 244, *November, 1893.*

1962. A sentence to forfeit all pay and allowances due and to become due forfeits commutation of quarters, fuel and rations, the same being included in the term allowances. LIII, 270, *April, 1887.*

1963. *Held* that one who had entered the army by a fraudulent enlistment was not entitled, upon his summary discharge without honor on the discovery of the fraud, to be paid the *travel allowance* provided by Sec. 1290, Rev. Sts. The principle that the party to a contract, against whom a fraud is committed by the other party in entering into the contract, may at once rescind the contract, the defrauding party thereupon losing all rights and profits under it, applies equally to contracts of enlistment. 54, 373, *July, 1892.*

1964. *Held* that the provision of the act of July 29, 1886, fixing the pay and allowances of general service clerks and messengers, did not preclude the reimbursement to them, out of the army appropriation for the fiscal year, of their actual necessary expenses while traveling under orders on public business. 61, 73, *August, 1893.*

1965. The regulation, par. 1594, published in G. O. 77, of September 8, 1893, as to transportation allowances for "general service clerks and messengers", being substantially no more than declaratory of existing law, *held* that the same was not prospective only but was applicable to cases of claims for such allowance pending at its date as well as those originating thereafter.<sup>1</sup> 62, 73, 76, *October, 1893.*

<sup>1</sup> "General service" clerks and messengers were done away with by the Army Appropriation Act of August 6, 1894.

1966. Where a hospital steward absent on furlough was, in an emergency, summarily ordered to his station for duty, pending the furlough, *held* that he was entitled to be reimbursed (out of the appropriation for transportation of the army) his proper transportation expenses, on his producing due evidence of the same, *viz.*, the receipts of the persons to whom the amounts were paid, or, in their absence, his own itemized sworn statement. 56, 269, *November, 1892.*

1967. Where a soldier was taken into the custody of the U. S. civil authorities on a criminal charge, and was brought to trial in a U. S. court and acquitted, *held* that a reimbursement of the expenses of his transportation and subsistence in returning to his military station could not legally be made him out of any appropriation applicable to the payment of such expenses in the army, but were proper for reimbursement by the Department of Justice. 57, 277, *January, 1893.*

1968. The act of July 29, 1886, in authorizing the enlistment of a body of men "for clerical service and messenger duty", provides that they shall be paid a certain fixed compensation, and "shall receive no other compensation, pay, or allowance" (except, under special circumstances, one ration in kind, for subsistence). *Held* that they were entitled, like other enlisted men, to medical treatment and attendance at the posts at which they were serving, such not being an "allowance", in the sense of being an element of *compensation*, as that term has been defined by the authorities.<sup>1</sup> LI, 613, *March, 1887.*

1969. An enlisted man, confined in arrest under charges and awaiting trial, was temporarily released to act as company cook, and did so act for one month. The status of arrest does not affect a soldier's right to the pay and allowances receivable from the United States, much less could it affect his right to an allowance payable out of the company fund. *Held* therefore that this man was entitled to the allowance for services as cook, made payable by par. 303, A. R. (1889), as amended by G. O. 13 of 1892. And *held* that a sentence adjudged this soldier, before the above allowance was rendered to him, by which was forfeited a portion of his monthly pay for three months, did not affect a compensation which was no part whatever of his pay. 58, 101, *February, 1893.*

#### PAYMASTER'S CLERK.

1970. A paymaster's clerk is a civilian (see Sec. 1190, Rev. Sts.), and no part of the army. Unless actually serving with an army in the field in time of war, and thus within the class of persons indicated by the 63d Article of War, he is not amenable to military discipline or the

<sup>1</sup> U. S. v. Landers, 92 U. S., 77; *Sherburne v. U. S.*, 16 Cl. Cls., 491.

jurisdiction of a court martial.<sup>1</sup> III, 269, *August, 1863*; Card 7424, *December, 1899*.

1971. *Held* that Sec. 1190, Rev. Sts., providing for the allowance of clerks for paymasters, did not authorize the continuance of the employment of such a clerk for a paymaster after he had become retired. The statute refers only to paymasters in active service. LIII, 265, *April, 1887*.

#### PAYMENT.

1972. In the absence of any usage, or course of dealing between the parties, or special direction by the creditor or person to whom the remittance is made, authorizing such a mode of transmission, the sending by mail to a party, of money due him, is at the risk of the party remitting; and, if the money is lost *in transitu*, such a sending does not amount to a legal payment or discharge of the debt.<sup>2</sup> So, where an officer, having in his possession certain company funds, due and payable to another officer stationed at another post, transmitted the amount in a communication by mail, without any request or authority from the latter so to forward the same, and the sum remitted, or a part of it, was lost *en route*; *held* that the loss must be borne by the officer sending the money. XXVI, 274, *December, 1867*. Similarly *held*, where a superior officer attempted to transmit to an inferior officer under his command, without any request or authority from him to so transmit the same, certain pay due the latter, in the form of a check payable to bearer, enclosed in a letter, which was lost or stolen *in transitu*. XXI, 112, *December, 1865*.

#### PENALTY ENVELOPE.

1973. *Held* that the words, "penalty for private use—\$300," printed upon an official envelope, constituted a sufficient "statement" under the act of July 5th, 1884, c. 234, s. 3, which provides simply that the envelopes shall "bear a statement of the penalty for their misuse." 60, 425, *July, 1893*.

1974. If the matter of carrying on correspondence becomes the official duty of a public officer and he conducts it in the discharge of that official duty, he is entitled to use the penalty envelope; otherwise he would not be. Card 276, *September, 1894*.

<sup>1</sup> Paymasters' clerks in the navy occupy a different status. They wear a uniform, have a fixed rank, and are held by the U. S. courts to be a part of the navy and amenable at all times to trial by naval courts martial. See *Ex parte Reed*, 10 Otto, 15, *In re Bogart*, 2 Sawyer, 396, *United States v. Bogart*, 3 Benedict, 257. But see *Ex parte Van Vranken*, 47 Fed. Rep. 888.

<sup>2</sup> *Gurney v. Howe*, 9 Gray, 404; *Boyd v. Reed*, 6 Hensk., 631; *Morton v. Morris*, 31 Ga., 378; *Burr v. Sickles*, 17 Ark., 428; *Selman v. Dun*, 10 West. L. J., 459; 2 Greenl. Ev. § 525; 1 Pars. Contr., 132.

1975. The law regarding the use of penalty envelopes (act of March 3, 1877, c. 103, s. 5 and 6, and the act of July 5, 1884, c. 234, s. 3) restricts the use of such envelopes, for the free transmission of enclosures, to "officers of the United States Government;" *except* that in the latter act it is provided "that any department or officer authorized to use penalty envelopes may enclose them, with return address, to any person or persons from or through whom official information is desired, the same to cover such official information and endorsements relating thereto." *Held* therefore that the authorities of a college, etc., where an officer of the army is on duty under Sec. 1225, Rev. Sts., are not authorized to *initiate* the use of the penalty envelope for the transmission of official papers pertaining to the military department thereof but may legally transmit the same to the proper department of the Government in penalty envelopes previously furnished to them by the department for the purpose. Card 729, *December, 1894*.

1976. *Held* that recruiting officers may legally use the penalty envelope for the transmission to private persons of circulars, letters, etc., giving information with regard to enlistment in the military service, and may also when verifying, by letter, an applicant's character, enclose a penalty envelope to cover the information sought. Card 1593, *July, 1895*.

1977. *Held* that penalty envelopes with return address could legally be sent from the office of the Commissary General of Subsistence to *ex-officers* of the military service, for use in transmitting answers to inquiries, propounded by that office to them in connection with pending claims of enlisted men who had been under their command, also to the same parties for use in furnishing that office at its request with information relating to claims of third persons for supplies furnished or services rendered to the United States, the information sought being official, inasmuch as it was to be called for by officers of the Government in connection with claims pending before them and not from the claimants themselves. Card 6236, *April, 1899*.

1978. When matters pertaining to the muster-in of United States volunteers "relate exclusively to the business of the Government of the United States," adjutants general of the respective States assisting in such muster-in may legally use the penalty envelope in their correspondence to the extent stated, but any person using it must decide for himself whether in the particular case it may legally be used, having in mind his criminal liability for a misuse thereof. Cards 4610, *January, 1898*; 6173, *April, 1899*; 7351, *November, 1899*.

1979. If official information is called for by the War Department respecting State militia, penalty envelopes may be furnished to cover the replies under the act of July 5, 1884, but this would not authorize



their use otherwise for the business of the militia with the general government. Card 6419, *May, 1899*.

1980. A penalty envelope or postal card with return address may legally be sent by a disbursing officer to a public creditor (a private person) to be used by the latter in acknowledging receipt of a check sent. Card 6236, *April, 1899*.

1981. Penalty envelopes cannot legally be used by retired enlisted men in sending to military posts for supplies for their use. Card 3415, *August, 1897*.

## PERJURY.

1982. It is a well settled rule of the common law that to sustain the charge of perjury, the evidence of two witnesses or of one witness with strong corroborating circumstances is necessary to prove the falsity of what was testified. XII, 631, *September, 1865*.

1983. Under this charge, testimony which consists of answers to questions going to the credit of a particular witness, or of other witnesses whom he corroborated, is "material to the issue." 36, 359, *November, 1889*; 54, 316, *July, 1892*.

1984. Where the prosecution introduced but one witness to prove the falsity of the testimony under this charge, and that witness was contradicted as to a material point and the accused was convicted, *advised*, pending the execution of the sentence, that the unexecuted portion thereof be remitted on account of the failure of proof. LIII, 644, *May, 1888*.

1985. False swearing by an officer or enlisted man before a court martial, knowing the same to be false, whether or not as to matter material to the issue, is "conduct to the prejudice of good order and military discipline", and is cognizable and punishable as such under the general (62d) article.<sup>1</sup> 36, 359, *November, 1889*.

1986. "False swearing," as the term is used in the order prescribing maximum punishments, means, (1) taking a false oath in a military judicial proceeding as to a matter not material to the issue; (2) taking a false oath otherwise than in a judicial proceeding, before a person legally authorized to administer the oath and under circumstances affecting the interests of the military service. 46, 211, *March, 1891*.

1987. A recruit's declaration as to his age is no part of the oath prescribed by the 2d Article of War. There is no law of the United States which requires that such statement shall be under oath. *Held*, therefore, that when the statement is false the recruit is not indictable for perjury under Sec. 5392, Rev. Sts. 30, 176, *February, 1889*.

<sup>1</sup> And in the case of an officer it is also chargeable as a violation of the 61st Article.

## PLEA.

1988. It is a general rule of criminal law that where the accused pleads guilty, no testimony on the merits is to be introduced. But, on military trials, the court, even against the objection of the accused, may, in its discretion, call upon the judge-advocate to offer evidence, or approve of his doing so, in a case where such evidence is deemed to be essential to the due administration of military justice.<sup>1</sup> An accused cannot be allowed, by pleading guilty, to shut out testimony where the interests of the service require its introduction. XXIX, 124, *July, 1869*. But in all cases where evidence is introduced by the prosecution after a plea of guilty, the accused should of course be afforded an opportunity to offer rebutting evidence, or evidence as to character, should he desire to do so. XII, 423, *February, 1865*.

1989. While it cannot properly be *ordered* by a commander that courts-martial convened by him shall not receive pleas of guilty, or shall take evidence on the merits notwithstanding pleas of guilty are interposed by the accused, it is yet proper, and in general desirable, particularly in cases of enlisted men, and especially where the specifications do not fully set forth the facts of the case, that the prosecution should be instructed or advised to introduce, with the consent of the court, evidence of the circumstances of the offence, where the plea is guilty equally as where it is not guilty. This for the reason that the court may be better enabled correctly to appreciate the nature of the offence committed and thus to estimate the measure of punishment proper to be awarded; and further that the reviewing authority may be better enabled to comprehend the entire case, and to determine whether the sentence shall be approved or disapproved (in whole or in part), or shall be mitigated or (in whole or in part) remitted. Where indeed the sentence is not discretionary with the court, the former reason does not apply, though in such case the evidence may be desirable as the basis for a *recommendation* by the members. But where the sentence is mandatory, the latter reason applies with the greater force, since the mandatory punishments under the Articles of War are

<sup>1</sup>The principle that in cases in which the plea is guilty the court should take testimony, where necessary to the comprehending of the facts and the doing of justice, though apparently in a measure lost sight of at a later period, was clearly enunciated in early general orders of the War Department. Thus, in G. O. 23 of 1830, Maj. Gen. Macomb (commanding the Army) expresses himself as follows:—"In every case in which a prisoner pleads guilty, it is the duty of the court-martial, notwithstanding to receive and to report in its proceedings such evidence as may afford a full knowledge of the circumstances, it being essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect." And see G. O. 21, of 1833, to a similar effect.

See now Court-Martial Manual (1901), pp. 31-33.

in general of the severest quality, and the reviewing officer in acting upon the same is called upon to exercise an especially grave discretion. In *capital* cases particularly, it is most important that all the facts of the case—all circumstances of extenuation as well as of aggravation—should be exhibited in evidence. III, 647, *September, 1863*; VI, 370, *September, 1864*. In practice, the absence of evidence to illustrate the offence has been found peculiarly embarrassing in cases of *deserters*. In a majority of these cases in which the plea is "guilty," the record is found to contain no testimony whatever; and a full and intelligent comprehension of the nature of the offence—whether desired upon the original review of the proceedings or upon a subsequent application for remission of sentence—is thus, in many instances, not attainable.<sup>1</sup> XXVII, 180, *September, 1868*.

1990. It not unfrequently happens upon trials of enlisted men that the accused, in pleading guilty, will proceed to make a *statement* (oral or written) to the court, which is in fact *inconsistent* with the plea. Thus, in a case where the accused, being evidently ignorant of the forms of law, pleaded guilty to an artificially worded charge and specification, and immediately thereupon made an oral statement to the court of the particulars of his conduct, setting forth facts quite incongruous with his plea, and no evidence whatever was introduced in the case;—*held* that the statement, rather than the plea, should be regarded as the intelligent act of the accused, and that, upon considering both together, the accused should not be deemed to have confessed his guilt of the specific charge. VIII, 274, *April, 1864*; XVII, 48, *June, 1865*; XXX, 33, *July, 1869*. In such a case the court will properly counsel the accused to plead not guilty, or direct such plea to be entered, and proceed to a trial and investigation of the merits (VI, 357, 370, *September, 1864*); the judge-advocate introducing his proof precisely as under an ordinary plea of not guilty. 61, 394, *September, 1863*. And where, with a plea of guilty, there was offered by the accused a written statement setting forth material circumstances of *extenuation*, and the court without taking any testimony whatever, or apparently regarding the statement, proceeded to conviction and sentence; *advised*—the case being one in which the sentence had been partly executed—that this action constituted a reasonable ground for a remission of a portion of the punishment. XX, 120, 127, 177, *November, 1865*; XV, 142, *April, 1865*; XXIX, 421, *November, 1869*; XXXII, 652, *May, 1872*; XXXIII, 42, *June, 1872*.

1991. Wherever, in connection with the plea of guilty, a statement

<sup>1</sup> See views of the Judge-Advocate General, relating to the subject of this paragraph, published in G. C. M. O. 09, Hdqrs. of Army, 1877.

or confession, whether oral or written, is interposed by the accused, both plea and statement should be considered together by the court; and if it is to be gathered from the statement that evidence exists in regard to the alleged offence which will constitute a defence to the charge, or relieve the accused from a measure of culpability, the court will properly call upon or permit the judge advocate to obtain and introduce such evidence, if practicable. XIV, 585, 596, *June, 1865*; XXVI, 562, *May, 1868*; XXVIII, 123, *September, 1868*; XXIX, 11, 348, *June and October, 1869*; 658, *February, 1870*.

1992. It has not unfrequently happened that enlisted men, charged with *desertion*, have, in connection with a plea of guilty, made a statement disclaiming having had, in absenting themselves, any intention of abandoning the service, and stating facts which, if true, constitute absence-without-leave only. In such a case the accused cannot in general fairly be convicted of desertion in the absence of an investigation, and the court will properly, therefore, induce him to change his plea to not guilty, or direct this plea to be entered and take such evidence as may be attainable, to show what offence was actually committed.<sup>1</sup> XXVI, 562, *May, 1868*.

1993. Statements inconsistent with the plea have not rarely been made in cases like *larceny* where several distinct elements are required to constitute the crime in law. For example, a soldier will plead guilty to a charge of larceny, and thereupon make a statement disclaiming the peculiar intent (*animus furandi*) necessary to the offence, thus really admitting only an unauthorized taking. In such cases the court will properly instruct the accused that he should change his plea to not guilty, and, if he declines to do so, will properly call upon the judge advocate to introduce evidence showing the actual offence committed. XXVIII, 677, *June, 1869*; XXIX, 658, *February, 1870*.

1994. A court martial is authorized, in *any* case, in its discretion, to permit an accused to withdraw a plea of not guilty, and substitute one of guilty, and *vice versa*, or to withdraw either of these general pleas and substitute a special plea. And wherever the accused applies to be

<sup>1</sup>The views of the Judge-Advocate General, as presented in §§ 1990-1992, have been adopted in the general orders of the War Department and in numerous orders of the various military department, &c., commands. In G. C. M. O. 2, War Dept. 1872, the Secretary of War observes, in regard to two cases of soldiers, as follows: "The written statements submitted by the accused are contradictory of their pleas of 'guilty.' The court should have regarded these statements as neutralizing the effect of their pleas, and should have had the accused instructed as to their legal rights, and advised to change their pleas with a view to the hearing of testimony. It not unfrequently happens that soldiers do not understand the legal difference between absence-without-leave and desertion, or are wholly unable to discriminate as to the grade of their offences, as determined by their motives. They thus, sometimes, ignorantly plead guilty and are sentenced for crimes of which they may be actually innocent. The proceedings, findings, and sentences are disapproved." And see G. C. M. O. 31, War Dept., 1876.



allowed to change or modify his plea, the court should in general consent provided the application is made in good faith and not for the purpose of delay, and to grant it will not result in unreasonably protracting the investigation. XXX, 672, *October, 1870*.

1995. Objections to the charges or specifications in matters of *form* should be taken advantage of by special pleas in the nature of pleas in abatement, or, better, by motion to strike out. Such are objections to the specifications as inartificial, indefinite, or redundant; or as misnaming the accused (or other persons required to be specified), or misdescribing him as to his rank or office; or as containing insufficient allegations of time or place, &c. In such cases the objection should be raised by a special plea in abatement, or by motion, in order that errors capable of amendment may be amended on the spot by the judge advocate, and—the plea of not guilty (or guilty) being then made—the trial may proceed in the usual manner. Objections of this class, not thus taken, will properly be considered as *waived* by the plea of guilty or not guilty, and their existence will not then affect the validity of the proceedings or sentence. V, 577, *December, 1864*; VII, 234, *February, 1864*; IX, 518, *August, 1864*; XV, 117, *March, 1865*; XXIV, 140, *January, 1867*; XXV, 100, *September, 1867*; XXVIII, 372, *February, 1869*; XXX, 288, *April, 1870*; XXXIV, 32, *November, 1872*; XXXV, 450, *June, 1874*; XXXVIII, 654, *June, 1877*; LI, 144, *February, 1887*; LVI, 243, *May, 1888*.

Where without preliminary objection the accused pleads guilty or not guilty to a specification, in which he is incorrectly named or described, such plea will be regarded as an admission by the accused of his identity with the person thus designated, and he cannot thereafter object to the pleadings on account of misnomer or misdescription.<sup>1</sup> V, 577, *December, 1864*; XV, 117, *March, 1865*; XXV, 100, *September, 1867*; LI, 144, *February, 1887*.

1996. Facts and circumstances which are properly matters of evidence are not legitimate subjects of pleas; as, for example, circumstances going to extenuate the offence. Thus *held* that good conduct of the accused in battle subsequent to the commission of the offence charged could not properly be presented in the form of a plea. VI, 79,

<sup>1</sup> Objections to the charges and specifications on account of matter of *substance*,—as that they do not contain the necessary allegations, or otherwise do not set forth facts constituting military offences,—should properly be made at the outset of the proceedings by a special plea in the nature of a *demurrer*, or they will in general be regarded as *waived*.

So, objections going to the legal constitution or composition of the court, or to its jurisdiction, should also properly be specially presented when the accused is first called upon to plead, valid objections of this *radical* character, however, are not *waived* if the accused, instead of submitting a special plea, pleads over to the merits, since *content* cannot confer jurisdiction on a court martial where none exists in law. See § 1031, *ante*, and note.

*April, 1864.* So *held* that the fact that the charge was preferred through personal hostility to the accused was not matter for plea, but, if desired to be taken advantage of, should be offered in evidence. XXXIV, 554, *October, 1873.*

1997. A plea of a restoration to duty by competent authority without trial, under the Army Regulations, is in the nature of a plea of a constructive pardon, and a good special plea in bar of trial. But going to trial on the general issue waives it.<sup>1</sup> XLIX, 94, *May, 1885.*

1998. An individual pardon must be pleaded; but a court is bound to take judicial notice, as affecting its jurisdiction, of a general pardon or amnesty. Thus where a court martial failed to do so in the trial of a deserter who had returned to service under the terms of the amnesty proclamation of March 11, 1865, this fact appearing from the specification to the charge of desertion upon which he was tried, it was held that the court was without jurisdiction of the offence and that the trial had was illegal. Card 1274, *April, 1895.*

1999. Where an accused declined to plead on the ground that he was so much under the influence of liquor at the time of the acts charged that he could not remember what occurred, *held* that the court properly directed a plea of "not guilty" to be entered. XLIX, 545, *December, 1885.*

2000. The fact that a sergeant has been reduced to the ranks, confined in arrest, and required to perform work under the custody of a sentinel, though such a disposition may be in excess of authority, cannot constitute a legal plea in bar to a trial upon the charge for which he was arrested. Such treatment is apposite to the case only as entering into the consideration of the question of the *quantum* of punishment upon conviction. XLVII, 242, *July, 1883.*

#### POST COMMANDER.

2001. A post commander cannot properly allow his post to become an asylum for fugitives from civil justice. XXXVI, 450, *May, 1875.*

2002. *Held* that the commander of the prison post at Alcatraz Island was authorized to make and enforce all necessary and proper regulations for the safe keeping and government of the military prisoners there confined; that he might, by the use of force, if needful, but using no more force than was necessary, prevent civilians from landing on the island in violation of the regulations, and put such persons off the island as had landed there contrary to the same; that, in an extreme case, as where a civilian engaged in aiding a prisoner to

<sup>1</sup> Compare *Heard's Criminal Pleading*, 296; *U. S. v. Wilson*, 7 Peters, 150.

escape, and no other means of prevention would avail, he might properly order the party to be fired upon by the guard. XXXII, 525, *April, 1872.*

**2003.** Where a general court martial has been convened at a military post by the department commander, the commander of the post is not empowered, in the absence of authority from such superior, to refer cases to the court for trial. Such action has sometimes been taken and acquiesced in, but (unless specially authorized) it is irregular and a transcending of his province by the post commander. XLI, 306, *July, 1878.*

**2004.** A Post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds, but should he admit everybody except one individual against whom no charge of wrong doing existed, such action would be considered an abuse of discretion on the part of the post commander. Card 2682, *October, 1896.*

#### POST EXCHANGE OR CANTEEN.

**2005.** The post exchange (or canteen) is (or was) in no sense a post trader but an establishment created solely by military orders. Card 1490, *July, 1895.*

**2006.** The relation which exists between the post exchange and the officer in charge, as to the custody of its funds, is not simply that of a gratuitous bailment. In a case of such a bailment, the law only requires slight diligence and makes responsible only for gross neglect. But the liability here is more than this; the custody of the funds is an official duty, devolving a material trust, and in the discharge of that duty a greater degree of care is required. So, where the officer in charge of a post exchange, in conveying the funds of the exchange from the post to a bank in the town for deposit, placed them in a package inside of the breast of his blouse which was without pockets, and the package slipped down and was lost—*held* that the officer had not used due care and should be charged with the amount lost. 54, 41, *June, 1892.*

**2007.** Where the officer in charge of a post exchange at a post adjoining a city, having in his hands for deposit in bank an amount of about one thousand dollars of post exchange funds, instead of personally attending to the deposit, sent in to the bank, with the funds, the post exchange steward, who appropriated to his own use a portion of the amount and did not return to the post till arrested by the civil authorities—*held* that the officer, not being a mere bailee without compensation but an official charged with the custody of the funds in a

public capacity, had not taken the degree of care properly required of him, and was responsible for the amount lost. **64**, 138, *March, 1894*.

**2008.** A post exchange was entered and robbed of a sum of money, consisting in part of that day's receipts and in part of a small and reasonable sum left by the officer in charge with the exchange steward, to make change. Under par. 337, A. R. (par. 4, G. O. 46, A. G. O., 1895), the officer in charge is not responsible for the day's receipts till turned over to him by the steward on the following morning. *Held*, in the absence of any evidence of negligence or want of precaution on his part, that the officer was not legally liable for the amount of the loss. **58**, 437, *March, 1893*.

**2009.** The post exchange is a part of the administrative machinery of the army established by army regulations which have the force of law. A fraud committed by the steward of a post exchange in its management is therefore clearly a military offence. *Curd* 5255, *November, 1898*.

**2010.** A post exchange is not a corporation but merely property appertaining to the organizations constituting the garrison. It is a co-operative store belonging to the persons or organizations which have paid for their shares of it. Articles donated to the exchange are donated to the owners, and such articles should be considered as part of the assets of the exchange, to be turned over, or accounted for, by its members to their successors. **65**, 127, *May, 1894*.

**2011.** *Held* (January, 1892), that the appropriation in the existing army appropriation act, "for fuel and lights for enlisted men," included the fuel and lights required at a canteen, since thus used, they are for "enlisted men" almost if not quite as much as when used in their places of messing and sleeping. But *held* otherwise as to the sale, to or for a canteen, of articles for fuel or light, for cash. The act authorizes such sale to "officers" only. And though the official in charge of a canteen is a commissioned officer, a sale to him of such material would not be for his use but for that of the canteen and therefore unauthorized. **51**, 239, *January, 1892*.

**2012.** When the post exchange (then called canteen) was of a private character it was held that stoppages of pay could not be made to reimburse losses of canteen funds; and at that time the Treasury Department also held that canteens were taxable by the Government. Subsequently (in 1897) the Treasury Department held that post exchanges as then organized under the orders of the War Department were government instrumentalities or agencies and were therefore not taxable under the internal revenue laws. The funds of the post exchange are moneys used in carrying on this public agency, and the Government has a right to protect its instrumentalities,—the



establishments through which it carries on public business. *Held* therefore that stoppages against the pay of officers and enlisted men may legally be made to reimburse the post exchange fund on account of losses for which such officers and enlisted men are responsible. Cards 3171, *June, 1897*; 7186, *October, 1899*.

**2013.** The post exchange (formerly canteen) was not established by Congress but is maintained under special regulations prepared by the War Department.<sup>1</sup> It is recognized as a government instrumentality, and has been recognized by Congress, by reference to it, in acts of June 13, 1890 (26 Stats., 154), and of July 16, 1892 (27 Stats., 178). Card 5394, *November, 1898*.

**2014.** A post exchange is not legally liable for local or municipal taxes or licenses, on the sale of commodities for the exclusive use of persons in the military service; such exchange being as was recognized by the Court of Claims (in *Dugan v. United States*) an instrumentality of the Government of the United States.<sup>2</sup> Card 7324, *November, 1899*.

<sup>1</sup> See G. O. 46, A. G. O., 1895, as amended by Post Exchange Regulations of February 2, 1901 pursuant to sec. 38 of the army act of February 2, 1901.

<sup>2</sup> In the case of *Thomas B. Dugan v. The U. S.* decided June 5, 1899 (34 Ct. Cls., 458), the Court said, "Under Post Exchange Regulations adopted by the War Department, and published by General Orders, No. 46, Headquarters of the Army, July 25, 1895, post exchanges were established and the commanders at every post thereby required to institute the same; to set apart, rent, or construct as therein provided a suitable building or rooms therefor and to detail an officer to be designated as 'officer in charge' to manage the business and affairs of such exchanges under the superintendence of a council consisting of three officers. \* \* \*

"Such exchanges were first organized under General Order No. 10, Adjutant-General's Office, February 1, 1889, and as thus organized superseded the 'canteens' which were organizations in the nature of social clubs, voluntarily formed by the officers of a regiment or other command with their own money and conducted independently of their official duties, as we are advised.

"These social clubs, known as 'canteens,' were organized after the office of sutler in the army had been abolished by the act of July 28, 1866 (14 Stat. L., 396). They were held liable to internal revenue tax the same as social clubs in cities selling manufactured tobacco, cigars and liquors to their members.

"By the act of January 28, 1893 (27 Stat. L., 426, 2 Supp. Rev. Stats., 76) post traderships in connection with the military service were also abolished, and following this came the establishment of 'post exchanges' by the regulations therefor, published in 1895, as aforesaid. \* \* \*

"On the application of the claimant Post Exchange Officer at Jefferson Barracks, Mo.), \* \* \* the Commissioner of Internal Revenue, under Revised Statutes, section 3426, as amended by section 17 of the act of March 1, 1879 (20 Stat. L., p. 349; 1 Supp. Rev. Stat. p. 241), made allowances or awards in his favor for the repayment to him of the special tax so paid and the Commissioner certified the same for payment. \* \* \*

"The decision of the Commissioner presumably based on 'satisfactory evidence of the facts' was that the post exchanges so established were 'no longer the mere social clubs that the old canteens were,' but that they were 'brought under the complete control of the Secretary of War by the regulations as governmental agencies' and for that reason the special tax was not required to be paid by post exchanges as 'dealers in oleomargarine, or as liquor dealers, or malt liquor dealers.' \* \* \*

"True such exchanges have not been authorized by direct legislation but the President has the undoubted power to establish rules and regulations for the government of the army, and whatever rules and orders are promulgated through the Secretary of War 'must be received as the acts of the Executive and as such be binding upon

**2015.** *Held* that the act of Congress of June 13, 1890 (26 Stats., 154), prohibiting the sale of alcoholic liquors beer or wine to enlisted men in any canteen or in any room or building at any garrison or military post "in any State or Territory in which the sale of alcoholic liquors, beer or wine were prohibited by law" does not apply to the State of South Carolina, the sale of such liquors being regulated but not prohibited by the laws of that State. Card 3601, *November, 1897.*

**2016.** *Held* that there is no legal objection to an allowance to the post exchange officer out of the exchange funds, to offset in a measure the pecuniary risk which he is obliged to take. Card 3108, *April, 1897.*

**2017.** A discharged soldier transferred his final statements to a post exchange officer, who thereupon advanced him from the post exchange funds seventy-five dollars and forwarded the statements to a paymaster. Upon receipt from the paymaster of a check for one hundred and two dollars and seventy-nine cents in payment of the final statements, the post exchange officer remitted twenty-seven dollars and fifty cents to the discharged soldier retaining twenty-nine cents to cover postage, registration fee, and cost of money order. Five months later the paymaster discovered that he had made an overpayment through his own error in computation and called upon the post exchange to reimburse him on the ground that it had received public money to which it was not entitled. The post exchange council disallowed the claim, setting forth in its proceedings that "the post exchange is expressly debarred from making any profit by these transactions, exchange officers being required to certify on each of the statements that they were cashed as

all within the sphere of his legal and constitutional authority," as was held by the Supreme Court in the case of the United States v. Flason (16 Peters 291). \* \* \*

"If, therefore, in the judgment and wisdom of the Executive the establishment of such post exchanges and their management by the officers of the army are essential to the welfare, good order, and discipline of the troops stationed at such army posts, as seems evident from the exchange regulations thus promulgated, then we think such exchanges, though conducted without financial liability to the Government, are, in their creation and management, governmental agencies, established for the purpose as the regulations provide of supplying 'the troops at reasonable prices with the articles of ordinary use, wear, and consumption not supplied by the Government and to afford them means of rational recreation and amusement,' and also 'through exchange profits, to provide the means for improving the messes.' \* \* \*

"Thus it will be seen that the establishment, maintenance, management and closing up of such exchanges are under the control of and subject to the regulations of the War Department as governmental agencies for the purpose aforesaid. \* \* \*

"The Government, through its officers, by authority of the regulations not only establishes and maintains such exchanges, but receives, handles, and disburses the funds in connection therewith, and whatever profit accrues is paid over to and held by the officer in command of such organizations as a company fund.

"It has never been the policy of the Government to tax its own enterprises or its own manner or method of doing business; and inasmuch as post exchanges are established and maintained by it for the mental and physical betterment of its troops in garrisons and posts, with resulting if not immediate benefit to itself, we think such exchanges are exempt from the payment of special tax for the sale of such articles as the regulations permit. \* \* \*

a matter of accommodation to the soldier and without profit to the post exchange; that in consequence it has been the custom to make an advance or partial payment to the men and upon receipt of the paymaster's check to make final settlement; that the Government does not furnish the exchange officer with any facilities for making computations in these cases, and hence he is obliged to regard the paymaster's check in settlement as officially accurate and final." *Held*, that the loss should not fall on the post exchange as under the circumstances it acted simply as the agency through which payment was made by the paymaster to the soldier and was in no way responsible for the error. The soldier and not the post exchange was the debtor to whom the paymaster should look for reimbursement for the overpayment. The error having been made by the paymaster the loss should fall on him under A. R. 654 (736 of 1901). Card 7589, *January, 1900*.

#### POST QUARTERMASTER SERGEANT.

2018. The act of July 5, 1884, c. 217, in authorizing the Secretary of War to appoint post quartermaster sergeants, provides that they shall be selected by examination from the most competent enlisted men in the army who have served at least four years and whose character and education shall fit them to take charge of public property and to act as clerks and assistants to post and other quartermasters. *Held*, that the Secretary of War may under this statute appoint as post quartermaster sergeant any enlisted man of the army who may be found to possess the qualifications specified and that the statement of par. 91, A. R., to the effect that they are appointed from sergeants in the line of the army should not be viewed as a restriction upon the appointing power of the Secretary. 47, 169, *May, 1891*.

2019. *Held* that a chief clerk at a department headquarters employed under the act of Aug. 6, 1894 (Army Appropriation Act) is not eligible for appointment as post quartermaster sergeant. Card 2034, *February 1896*.

#### POST TRADER.

2020. Sutlers having been finally done away with, from and after July 1, 1867, by the act of July 28, 1866, c. 299, s. 25, Congress, by joint resolution of March 30, 1867, conferred authority upon "the commanding general of the army to permit a trading establishment to be maintained," after the above date of July 1, 1867, "at any military post on the frontier not in the vicinity of any city or town (and situated at any point between the 100th meridian of longitude, west from Greenwich, and the eastern boundary of the State of California) when

in his judgment such establishment is needed for the accommodation of emigrants, freighters and other citizens: \* \* \* *provided* that such traders shall be under protection and military control as camp-followers."

By the act of July 15, 1870, c. 294, s. 22, this statute was repealed and there was enacted in its place the following: "That from and after the passage of this act, the Secretary of War be, and he is hereby, authorized to permit one or more trading establishments to be maintained at any military post on the frontier not in the vicinity of any city or town, when, in his judgment, such establishment is needed for the accommodation of emigrants, freighters, and other citizens; and the persons to maintain such trading establishments shall be appointed by him: *provided* that such traders shall be under protection and military control as camp-followers." This provision constituted the existing law on the subject at the date of the adoption of the Revised Statutes, and is incorporated in the same in Sec. 1113.

Further, by the act of July 24, 1876, c. 226, s. 3, it has been provided: "That every military post may have one trader, to be appointed by the Secretary of War on the recommendation of the council of administration, approved by the commanding officer, who shall be subject in all respects to the rules and regulations for the government of the army."

The act of 1876, though apparently intended to supersede Sec. 1113, Rev. Sts., does not *necessarily* repeal the same. It is believed therefore to be still proper for the Secretary of War, in appointing a post trader, to take into consideration not merely his fitness and acceptableness as a purveyor for the army at a military post, but also the question whether a trading establishment is needed at the post "for the accommodation of emigrants, freighters, or other citizens."<sup>1</sup> XLIII, 239, *February, 1880*.

2021. Under the provision of the act of 1876, a trader may be appointed, not merely for remote or frontier posts, at which only trading establishments could be maintained under previous enactments, but for any military posts, in the discretion of the Secretary of War. XXXIX, 674, *September, 1878*.

2022. The *term* of the appointment or license of a post trader, not being fixed by the statute, is regulated by the general principle of public law, that where the tenure of a public office or employment created by Congress is not defined by that body, the same is to be

<sup>1</sup> That Sec. 1113 is not superseded, in the opinion of the Attorney General, is evident from his opinion in 16 Opns. 403. And compare *id.* 658. But see the final act of January 28, 1893, practically doing away with post traders, referred to in § 2036, *post*.



regarded as held at the pleasure of the appointing power.<sup>1</sup> XXXIX, 639, *August, 1878*.

2023. A post trader is not, under the act of 1876, and was not under that of 1867 or 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp follower in time of peace, and the only military jurisdiction to which a camp follower may become subject is that indicated by the 63d Article of War, viz., one exercisable only "in the field" or on the theatre of war. Nor can the act of 1876, in providing that post traders shall be "subject to the rules and regulations for the government of the army," render them amenable to trial by court martial in time of peace. The subjection referred to in the act is apparently only to the body of administrative directions known as the Army Regulations. (See § 2025, *post*.) If, however, the Articles of War are intended to be included, the amenability imposed is simply that fixed by the particular article applicable to civilians employed in connection with the army, viz., Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court martial if employed on the theatre of an Indian war, as persons serving with an army in the field in the sense of that article, they cannot be made so liable when not thus situated, and, as a general rule, the only adequate remedy in the event of serious misconduct by a trader in time of peace would be the summary withdrawal of his appointment or license by the Secretary of War. XXXIX, 395, *January, 1878*. (See note to § 2022, *ante*.)

2024. Unlike the sutler under the old law, the post trader has no lien upon the pay of soldiers for articles sold to them on credit. Their pay cannot legally be in any part retained by the company commander to reimburse the trader, nor can it be withheld by the paymaster for such purpose against their consent. If a soldier in debt to the trader consents to the paymaster's delivering his pay in whole or in part to the trader at the pay table, the paymaster will be protected in thus paying the same; the soldier being viewed not as thus assigning his pay (which would be in violation of law—Sec. 1291, Rev. Sts.), but as himself receiving the same and turning it over to the trader in and by the same act. XXVII, 282, *September, 1868*; 559, *March, 1869*; XXI, 229, 231, *August, 1869*; XXXI, 655, *September, 1871*. So, a

<sup>1</sup> *Ex parte Hennen*, 13 Peters, 230. It is held by the Attorney General [5 Opins. 275], that the appointment of a post trader is a mere license revocable at the pleasure of the Secretary of War; the concurrence of the post command and post commander not being required for the removal, as they were (by the act of July 24, 1876) for the appointment, of the trader.

paymaster is not authorized, without the express consent of the soldier, to deduct from the pay due him on a "final statement" an amount admitted to be due by him to a post trader. XXIX, 231, *August, 1869*. An amount due by an officer or soldier to a trader cannot legally be forfeited or stopped for the benefit of the latter by a sentence of court martial. XXVII, 422, *December, 1868*; XXXI, 376, *May, 1871*.

2025. The Army Regulations of 1863, applicable to sutlers, were declared by the Secretary of War, in a circular issued from the War Department, dated June 7, 1871, to be not applicable to post traders, and it was added, "no tax or burden in any shape will be imposed upon them." Subsequently, however, to the passage of the act of July 24, 1876, in which it is provided that traders shall be subject to the rules and regulations for the army, this class of persons were, by a circular issued from the Headquarters of the Army, dated July 31, 1878, required to be "assessed and held to pay, at a rate to be determined by the Post Council of Administration, not exceeding ten cents a month for every officer and enlisted soldier serving at the post—the monthly average number of such persons to be determined equitably by the council—for the benefit of the post fund, as required by Gen. Orders No. 24, May, 1878,<sup>1</sup> from this office." *Advised* that this imposition of a pecuniary mulct upon a civilian, not subject to the legal liabilities of a sutler, was scarcely within the province of an administrative regulation, and that the same could be enforced with entire legality only by authority of statute.<sup>2</sup> XLIII, 157, 239, *January and February, 1880*.

2026. It was held by Attorney General Cushing in 1855<sup>3</sup> that a sutler employed at a military post could not legally be required by the authorities of a State to take out a license to enable him to make sales to officers or soldiers of the army, or to pay a tax on the articles kept by him at the post for making such sales; and this on the ground that "the supply of goods to the officers and soldiers of a post by the post sutler is one of the means authorized by Congress in the exercise of the war power intrusted to it by the Constitution." This opinion, however, further holds (to cite from the headnote): "But sutlers may be compelled to pay license if they enter into general trade within the State." So, in a case of a trader at a military post in a Territory, by whom liquor was kept for sale as a part of his stock, who addressed

<sup>1</sup> This order, in adopting the recommendation of a board to that effect, had already in substance directed the assessment of this tax.

<sup>2</sup> A different conclusion is arrived at in an opinion of the Solicitor General, in 16 Opins. At. Gen., 658.

<sup>3</sup> 17 Opins. At. Gen., 578. And compare 4 *id.* 462.

to the Secretary of War an inquiry as to whether he could legally be compelled by the Territorial authorities to pay a tax for a license to sell liquor. *held*, that, inasmuch as the business of post traders extends to the making of sales to civilians,—their establishments having originally been authorized “for the accommodation of emigrants, freighters, and other citizens,” and their trade having never been subsequently restricted to persons connected with the army, they could in general legally be required by the local authorities of the State or Territory to take out and pay for licenses in the same manner as other merchants engaged in similar trades;<sup>1</sup> but *remarked* that the question of the legality of such a tax was rather one for the local courts than for the Secretary of War. XXX, 177, *March, 1870*; XXXVI, 595, *July, 1875*; XXXIX, 395, *January, 1878*; XLI, 306, *July, 1878*; XLII, 83, *December, 1878*; XLIII, 155, *January, 1880*.

2027. The mere fact that a post trader carries on business on a military reservation in a Territory cannot (in the absence of any provision in the organic act relieving him therefrom) affect his liability to be taxed by the civil authorities; nor can such liability be affected by the fact that he carries on business on a military reservation within a State, unless exclusive jurisdiction over the same has been ceded to or reserved by the United States. XLIII, 155, *January, 1880*.

2028. *Held* that a post trader duly appointed for a military post might properly be authorized to erect on the post reservation, on a site to be selected by the post commander, such buildings as were necessary or desirable for his business. XXXIII, 458, *October, 1872*. And *held* also that, on his appointment or employment being terminated, he would properly be allowed a reasonable time to remove such buildings.<sup>2</sup> XLI, 122, *February, 1878*.

2029. *Held* that a post trader, whether appointed by the authority of the act of July 15, 1870 (Sec. 1113, Rev. Sts.), or of that of July 24, 1876, was not—inasmuch as he did not exercise a public function or act for or represent the United States in any particular—a “person holding a commission or appointment under the United States,” in the sense of Sec. 1854, Rev. Sts., and was therefore not ineligible to be a member of the legislature or to hold office under the government of a Territory. XLII, 46, *November, 1878*.

2030. A post trader cannot legally trade with Indians in the Indian country without being specially licensed therefor according to the provisions of Sec. 2129, Rev. Sts. XLII, 400, *September, 1879*.

<sup>1</sup>This view was concurred in by the Department of Justice. See 16 Opins. 658, also *id.* 403.

<sup>2</sup>See these conclusions concurred in, in a subsequent opinion of the Attorney General, in 14 Opins. 125.

There is nothing in the appointment or office of a post trader from which there can be implied any special authority to trade with Indians, or which can exempt him in any measure from the application of the laws (see Tit. XXVIII, ch. 4, Rev. Sts.) prohibiting or restricting such trade.<sup>1</sup> So where a post trader had been authorized (under Sec. 2139, Rev. Sts.) to keep liquor at a military post in the Indian country for the purposes of sale, under regulations, to officers and soldiers, *held* that the authority could not operate as a license to make sales of the same to Indians. XLI, 544, *April, 1879*.

2031. *Held* that a post trader could not, against his will, be *compelled* by the post council or post commander to sell spirituous liquors. Where a trader refuses to keep and sell any particular article or articles which, in the opinion of the council and commander, he should trade in, the only remedy is by an appeal to the Secretary of War, who, if he deems the refusal unreasonable, may cancel the trader's license. XLIII, 166, *January, 1880*.

2032. A post trader has no *lien* on a soldier's pay, and a post commander has no authority to enforce a soldier's promise to pay for articles purchased from the trader. 40, 80, *March, 1890*.

2033. A post trader supplies in a great measure the needs of the post, is assessed for the post fund, receives military protection, and is subject to the Army Regulations. So, *held* of a trader at a post on an Indian reservation, that he was so far a part of the military establishment as properly to be considered entitled to the benefit of the regulation of the Indian Department authorizing the military at such a post to cut and use without charge timber and hay sufficient for their necessary wants. L, 321, *June, 1886*.

2034. A post trader became bankrupt, abandoned his business, and transferred, by deed of trust in favor of his creditors, his store and his goods, which were also attached by a sheriff. *Held* that, while his property should be permitted to be removed, he should be deemed to have forfeited his appointment. The act of July 24, 1876, c. 226, s. 3, authorizing the appointment of post traders, contemplates their actual continuing use of the privileges granted, not only for their own profit but for the benefit and convenience of the post, and the non-user and abandonment of such privileges should properly operate as a voluntary forfeiture. LVI, 437, *August, 1888*.

2035. The appointment of a post trader is a mere license or permit with the understanding that it must be revocable; and in his business the trader is subject to the existing Army Regulations and police. Thus *held* that the regulations establishing canteens at military posts were not in conflict with the statute law providing for post traders.

<sup>1</sup> See the confirmatory opinion of the Attorney General, in 16 Opins. 403.



and were therefore not unauthorized or illegal. A canteen is a distinct institution from that of the post trader, being created not for trade with the general public, nor to be carried on for a purpose of profit, but as an additional facility for the uses of the troops, and while its sales may affect the business of the trader, its existence is not incompatible with that of his establishment. And *held* that the Government was under no legal obligations to purchase the buildings or stock of the trader at a post at which a canteen had been initiated. 38, 227, *November, 1889*.

2036. The act of January 28, 1893, c. 51, provides that thereafter vacancies in the position of post trader shall not be filled, and terminates the power of appointment of such traders. *Held*, that this statute did not preclude the licensing of a certain applicant to pursue the business of a restaurant keeper on the military reservation of Fort Wood, Bedloe's Island, New York Harbor, his status at such being quite distinct from that of a post trader under the laws authorizing that class. 61, 80, *August, 1893*.

#### POWER OF ATTORNEY.

2037. A contractor having a claim against the United States, executed a power of attorney to a party (a lawyer), authorizing him to represent him in prosecuting his claim before the War Department, &c., and to receive for him payment of such amounts as should be allowed him. The power was expressed to be "irrevocable," but did not in terms vest the attorney with any property or interest in the claim, nor did it appear from the relations of the parties or otherwise that any such interest existed. Subsequently, and before the allowance of the claim, the claimant, by a second power, expressly revoked the former power and substituted another person as attorney in the place of the party originally constituted. *Held* that the first power was not in itself a power coupled with an interest; that the fact that fees were probably to be earned by the attorney did not (in the absence of a special contract making the same a lien upon the amounts authorized to be received under the power) constitute an interest therein;<sup>1</sup> that the word "irrevocable," as employed in the power, was under the circumstances without legal significance or effect;<sup>2</sup> that such power was therefore revocable at the pleasure of the claimant; and that the attorney substituted by the second power would accordingly properly be recognized at the War Department.<sup>3</sup> XXXI, 164, *January, 1871*.

<sup>1</sup> See *Bristol's case*, 11 Opins. At. Gen., 7.

<sup>2</sup> *Pratt v. United States*, 3 Ct. Cls., 117; *Hunt v. Roumanner's Admors.*, 8 Wheaton, 174.

<sup>3</sup> Compare 16 Opins. At. Gen., 261.

**PRESIDENT—AUTHORITY TO CONVENE GENERAL COURTS  
MARTIAL.**

**2038.** The President is empowered to convene general courts martial, not merely in the class of cases specified in the 72d Article of War (viz., where a military officer, thereby authorized to convene such a court, is the "accuser or prosecutor" of an officer in his command whom it is desired to bring to trial), but, generally, and in any case, by virtue of his authority as commander-in-chief of the army. As such, he is authorized to give orders to his subordinates, and the convening of a court martial is simply the *giving of an order* to certain officers to assemble as a court and exercise certain powers conferred upon them, when so assembled, by the Articles of War. This general power has been exercised in repeated instances by the President since the formation of the Government. Indeed, if the same could not be exercised, it would be impracticable, in the absence of an assignment of a general officer to command the army, to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department, &c., commander, as a large proportion of the officers of the general staff for example.<sup>1</sup> XXXIII, 603, *December, 1872*.

**2039.** A convening of a general court martial nominally by the Secretary of War is in law a convening by the President, and therefore as legal as if the President himself had signed the order. IX, 44, *May, 1861*. See § 2204, *post*.

**PRESIDENT—AUTHORITY OVER THE PROCEEDINGS AND  
SENTENCES OF COURTS MARTIAL.**

**2040.** In cases tried by general courts martial convened by himself, either under his general authority as commander-in-chief (see § 2038, *ante*), or as provided in the 72d Art. of War; also in cases of sentences imposed upon general officers and of sentences of death or dismissal adjudged in time of peace (see Arts. 105, 106 and 108); and in cases submitted to him for action in time of war under Art. 111,—the President acts as reviewing authority, and may approve or disapprove in whole or in part the proceedings or sentence, or, in

<sup>1</sup>The authority of the President as commander-in-chief to institute general courts martial has been in fact exercised from time to time from an early period, in a series of cases, commencing with those of Brig. Gen. Hull, Maj. Gen. Wilkinson, and Maj. Gen. Gaines, tried in 1813-1816, and including that of Bvt. Maj. Gen. Twiggs, tried in 1858. His authority in this particular has been in substance affirmed by the Judiciary Committee of the Senate, in Report No. 868, dated March 3, 1879, 45th Cong. 3d Session. A single member of the Committee apparently dissented, in a subsequent report of April 7, 1879, Mr. Doc. No. 21, 46th Cong., 1st Sess. See Swann v. U. S., 28 Ct. Cls. 173, and 165 U. S., 559.

approving, mitigate the punishment. But when final action has been taken by him in any of these cases, his function as reviewing or confirming authority is *exhausted*. Where indeed he has approved or confirmed a punishment, and the same remains in any part unexecuted, he may of course exercise the quite distinct power of pardon; but an approval or disapproval once given by him, and duly notified to the accused,—though his action may afterwards be discovered to have worked an injustice,—is beyond his power to revise, reverse, or modify. IX. 44. *May, 1864*; XXXVIII. 104. *Jan., 1876*; XLII. 91, *December, 1878*.

2041. So, where a legal sentence adjudged by a court martial has once been duly *executed*, the same is irreversible and cannot be rescinded or modified by virtue of any executive authority of revision or pardon vested in the President. However severe or unjust such a sentence may have been, or whatever irregularity (short of an absolutely fatal defect) may have characterized the proceedings, the case, after the sentence, as approved, has been executed, is wholly beyond executive control.<sup>1</sup> XXXVI. 274, 330, *February and March, 1875*; XXXVII. 243, 390, 420, *January and March, 1876*; XXXIX. 242, 248, *October, 1877*; 34. 334, *August, 1889*.

#### PRESIDENT—AUTHORITY TO RESTORE TO THE ARMY.

2042. While, as provided in Sec. 1228, Rev. Sts., an officer duly dismissed from the army *by sentence of court martial* can be restored to it only by a new appointment; so, except by a new appointment, the President cannot restore an officer separated from the army *otherwise* than by sentence, viz. by summary dismissal by order, or by being "wholly" retired, or by the acceptance of a resignation. Thus separated, the officer is made a civilian as effectually as if he had been dismissed by sentence; and, as to a readmission to the service, he is in precisely the position of a civilian who has never been in the army at all. He can therefore be admitted to it only in the mode pointed out in the Constitution (Art. II, sec. 2, par. 2). A *revocation* of the order by which he was dismissed or wholly retired, or of the acceptance of his resignation, must (after notice) be quite futile and ineffectual. An order purporting to *revoke* a previous order by which an officer has been legally detached from the military service is a simple nullity. XXXV. 466, *July, 1874*; XXXVII. 451, *April, 1876*; XXXIX. 474, *March, 1878*; XLI. 611, *July, 1879*.

<sup>1</sup> Such a sentence is "no longer subject to review by the President." 15 Opins. At. Gen. 290.

## PRESIDING OFFICER OF THE COURT.

**2043.** No special rank or qualifications are required for the position of president of a military court. In our practice the president is not appointed as such; he is simply the senior in rank of the members present, and he presides by virtue of his seniority alone. If the senior of the officers detailed in the convening order is not present with the court at the original organization, the next senior present becomes president; so, if the officer who presided at the beginning of a trial is at a subsequent stage of the proceedings relieved or compelled to be absent by sickness, &c., the next ranking officer present presides as a matter of course; and the senior officer present with the court at the termination of the trial authenticates the proceedings as president. XXX, 246, *April, 1870*; Card 5232, *November, 1898*.

**2044.** While a special authority—that of swearing the judge-advocate—is devolved upon the president of a military court by statute (the 85th Article of War<sup>1</sup>), such officer has, in other respects, as in performing the usual duties of a presiding officer, in authenticating the proceedings with his signature, and in communicating with the convening officer or other commander, no original authority but acts simply as the representative and “organ” of the court.<sup>2</sup> XXVIII, 678, *June, 1869*; XXX, 246, *April, 1870*.

**2045.** The president of a military court has no command as such. As president he cannot give an *order* to any other member. As the organ of the court he gives of course the directions necessary to the regular and proper conduct of the proceedings; but a failure to comply with a direction given by him, while it may constitute “conduct to the prejudice of good order and military discipline,” cannot properly be charged as a “disobedience of a lawful command of a superior officer,” in violation of Article 21. XXX, 246, 315, *April and May, 1870*.

**2046.** For the president of a court martial to assume to adjourn the court against the vote of the majority of the members, would be an unauthorized act and a grave irregularity, properly subjecting him to a charge under the 62d Article.<sup>3</sup> XXX, 248, *April, 1870*.

<sup>1</sup>The further function devolved upon him by Art. 52 is not known to have ever been exercised in our service: the article itself is a dead letter, as is also Art. 53 *in pari materia*.

<sup>2</sup>See par. 1005, Army Regulations of 1889. The language of this regulation is taken from the order of Secretary Crawford in his review of the case of Bvt Lt Col Backenstos, in G. O. 14, War Dept., 1850. It is now incorporated in the Court-Martial Manual (1901), p. 22.

In deliberations on questions raised upon a trial, as well as in the finding and the adjudging of the sentence, the presiding member is on a perfect equality with the other members. He has no casting vote, nor if the vote is even, does his vote have any greater or other weight or effect than that of any other member.

<sup>3</sup>Case of Backenstos, G. O. 14, War Dept. 1850.



## PREVIOUS CONVICTIONS.

2047. *Held* that the reopening of the court, after a conviction, to receive evidence of previous convictions, was not a violation of the 84th Article of War. The procedure is in accordance with the spirit of the legislation which excludes judge-advocates from closed sessions to place prosecution and defence on a more equal footing, by allowing the accused to be present when evidence of previous convictions is submitted and to scrutinize and test the legality of the same. 63, 49, *December, 1893*; Card 3097, *April, 1897*.

2048. A court martial refused to take into consideration evidence of previous convictions offered by the judge-advocate, on the grounds—1st, that the accused had been previously punished for each offence; 2d, that he had not introduced any testimony in support of his character, and, in the absence of such testimony, the rules of evidence preclude attacking the same. *Held* that such objections were not well taken.<sup>1</sup> L, 647, *August, 1886*.

2049. A memorandum of the previous conviction is not sufficient; they must be shown either by the records of the trials or by duly authenticated copies of the records or of the orders of promulgation. LII, 508, *September, 1887*. It is unauthorized for the judge-advocate to introduce, or the court to admit, as evidence of previous convictions (or in connection with proper evidence of the same), the statement of service, &c., required by par. 1015, A. R., to be furnished to the convening authority with the charge.<sup>2</sup> 39, 450, *March, 1890*.

2050. While there is no legal objection to the consideration by courts martial of evidence of previous convictions, not referred to them by the convening authority, yet to secure a uniformity of practice in the matter, *recommended* that general courts martial be directed to consider only such evidence of previous convictions as is referred to them by the convening authority.<sup>3</sup> Card 3013, *May, 1897*.

2051. Previous convictions except of desertion on a trial for desertion, not adjudged during the current pending enlistment of the soldier but incurred during a prior enlistment, are not admissible. LVI, 305, *July, 1888*; 61, 225, *August, 1893*. Nor is evidence of a previous conviction by a *civil* court admissible in this procedure. 26, 380, *September, 1888*.

2052. Evidence of a previous conviction is not admissible where the findings and sentence were *disapproved* by the proper reviewing

<sup>1</sup> A statute imposing heavier penalties on a person convicted of a felony, if twice before convicted of a crime, is not unconstitutional, as putting twice in jeopardy. *McDonald v. Mass.*, 180 U. S. 311.

<sup>2</sup> See Circular 13, A. G. O., 1890.

<sup>3</sup> See this recommendation adopted and published in Circular 11, A. G. O., 1897.

authority. LII, 121, 508, *March and September, 1887*. As to all trials (except those had by a summary court where the post commander acts as the court, and no approval of the sentence is required by law), the term "previous conviction" means a conviction to which effect has been given by the approval of the sentence by competent authority.<sup>1</sup> 58, 210, *March, 1894*.

2053. The proper evidence of a previous conviction by a summary court is the summary court record relating thereto, or a copy of the same, certified to be a true copy by the post commander or adjutant. 64, 36, *February, 1894*; 65, 170, *June, 1894*. The certificate of the company commander to the fact of such conviction, as shown by the company records, will not be a legal substitute. 65, 170, *supra*. When the proof produced is the copy furnished the company or other commander, it should be returned to him, and a copy attached to the record of the court martial (except that of the summary court) before which the trial is had.<sup>2</sup> Card 208, *September, 1894*.

2054. Under the Executive order of March 30, 1898, previous convictions "whatever their number within the prescribed period," are admissible to aid the court in determining upon the proper measure of punishment,<sup>3</sup> whether the limit of punishment is within or greater than the punishing power of an inferior court; but if greater, the prescribed limit can only be increased on account of such convictions as are specified in subdivision 4, Article III, of the order (Manual, 1901, p. 55.) The limits of punishment are, however, operative only "in time of peace." (Act of September 27, 1900, Manual, 1901, p. 48.) In time of war, therefore, courts martial are remitted to the discretion conferred upon them by the Articles of War. Card 5781, *February 1899*.

## PRISONER OF WAR.

### 1—PRISONERS TAKEN FROM THE ENEMY.

2055. An engineer captured while doing duty on a steamer of the enemy, *held* properly detained as a prisoner of war, civil employees of the enemy serving with its army in the field being regarded as on the same footing in this respect with the soldiers of such army. VI, 542, *August, 1866*.

<sup>1</sup>See Circ 10, A. G. O. 1893.

<sup>2</sup>The copies furnished the company or other commander are identical with those furnished for use as evidence of previous convictions. (See Court-Mar. Manual (1901), p. 15.) To distinguish the former from the latter and to thus insure their return, the fact that they belong to records of a company or other organization should, by the mark or otherwise, be disclosed.

<sup>3</sup>This provision is repeated in the new Executive order of March 12, 1901, prescribing limits of punishment, published in G. O. 42, A. G. O., 1901. (See Court-Mar. Manual (1901), p. 55, par. 4.)

**2056.** Where certain persons, apprehended, while engaged apparently as partisans in a raid from Kentucky into Indiana, were held to trial by a civil court of the latter State for robbery, and the Confederate agent for the exchange of prisoners of war made thereupon official application that they should be treated and exchanged as such prisoners, on the ground that they were Confederate soldiers acting under the orders of their military superiors—*advised*, in view of the serious doubt as to their real status, that they be left to have their offence passed upon by the court which had assumed jurisdiction of their case, and by which the defence that their operations were legitimate acts of war could be properly investigated.<sup>1</sup> 11, 391, *June, 1863*; V, 344, *November, 1863*.

**2057.** Where a prisoner of war, held with other prisoners at a prison camp within a State in which the civil courts were in operation, killed one of his fellow prisoners, *advised* that the Government might in its discretion turn him over for trial to the State authorities, or exchange him under the cartel and leave him to be tried by the Confederate authorities. XIII, 498, *March, 1865*.

**2058.** The violation of his parole by a paroled prisoner of war is an offence against the common law of war and punishable with death.<sup>2</sup> VI, 20, *January, 1864*.

**2059.** Where certain soldiers of the enemy's army, having been taken prisoners in Virginia upon Lee's surrender, were released on parole, on condition of their returning to their homes, *held* that this parole did not authorize them, in the absence of special authority from the U. S. Government, to come within our lines and into the State of Maryland, although that State had been their place of residence before the war; and that, in actually coming into Maryland, they were chargeable with a violation of their parole.<sup>3</sup> And *held*, further, that a citizen of Maryland, in harboring and relieving them after coming into that State, was chargeable with an offence under Art. 45. XII, 400, *May, 1865*.

## II—PRISONERS TAKEN BY THE ENEMY.

**2060.** *Held*, in the absence of any stipulation to the contrary in the cartel of exchange,<sup>4</sup> that a prisoner of war of our army, released on parole by the enemy, might legally be put on duty as one of the post

<sup>1</sup> See 11 Opins. At. Gen. 240.

<sup>2</sup> See G. O. 100, War Dept., 1863, par. 124 (Lieber's Instructions).

<sup>3</sup> In 11 Opins. 207, Atty. Gen. Speed says of these paroled prisoners that they "cannot be regarded as having homes in the loyal States. . . . As belligerents their homes were, of necessity, in the territory belligerent to the Government of the United States."

<sup>4</sup> See 10 Opins. At. Gen. 357.

guard at a post not in the field or threatened by the enemy.<sup>1</sup> XXI, 592, *August, 1866*.

2061. A prisoner of war, on being paroled, is not necessarily bound to return to the regiment or other command to which he was attached upon capture, or subject, if he does not return, to be treated as a deserter. In the absence of any special order given him by competent authority, he is required only to abide by the existing orders in regard to paroled prisoners in general. XXXIX, 339 *December, 1877*.

2062. Where an officer of our army, while on trial or awaiting sentence, is taken prisoner by the enemy, and a sentence of dismissal adjudged by the court and duly approved is not officially communicated to him till, upon being exchanged, he has returned to his regiment, he is entitled to be treated and paid as having been in the U. S. service up to the date of such notification. And so of an officer dismissed by order, or a soldier dishonorably discharged by sentence under similar circumstances.<sup>2</sup> XII, 230, *January, 1865*; XIII, 589, *April, 1865*; Card 2039, *February, 1896*.

2063. Officers and soldiers of our army taken prisoner by the enemy and released on parole, are (in the absence of any statutory provision to the contrary) to be regarded, while occupying this status, precisely as officers and soldiers on ordinary active duty; so far as concerns their right to pay.<sup>3</sup> I, 385, *October, 1862*.

2064. A paroled prisoner is simply a soldier who has been placed under a disability to engage in active operations against the enemy. He remains a part of the army and as much subject to military control as he was before his capture. If he absents himself without authority from the post or station to which as a paroled prisoner he has been assigned by the military authorities, he is absent without leave or in desertion according to the intent with which he absented himself. Card 1746, *September, 1895*.

2065. While it is laid down by the authorities<sup>4</sup> that a prisoner of war is, strictly, justified in enlisting in the service of the enemy only by a well founded apprehension of immediate death, yet where soldiers of the Federal army, while subjected, when prisoners in the hands of the enemy, to extreme privation and suffering by which their lives

<sup>1</sup> See G. O. (A. & I. G. O.) of Feb. 14, 1814; do. 100, War Dept. 1863, par. 130 (Lieber's Instructions).

<sup>2</sup> Note the provision of the act of 1814, now incorporated in Sec. 1288, Rev. Stat., entitling certain officers and soldiers to be paid as such during their captivity when made prisoners of war by the enemy. And see *Jones v. United States*, 4 Ct. Cls. 197 (Phelps v. United States, *et al.* 209—adjudicated case of officers dismissed while prisoners of war and claiming pay under the statute).

<sup>3</sup> As to the status of prisoners of war, whose (volunteer) regiments were mustered out in their absence, see G. O. 108 of 1863.

<sup>4</sup> *Respublica v. Mcarty*, 2 Dallas, 86, United States v. Vigil, *et al.* 346. And compare *United States v. Griner*, 4 Phila. 396, 401.



were imperilled, were induced, solely in order to find means of escape from such desperate situation, to enlist in the enemy's army, *advised* that such soldiers, on subsequently surrendering to or being captured by our forces, should not as a general rule be treated as deserters but should be returned to duty with their regiments without punishment. XIV, 135, *February, 1865*; XVI, 40, 271, *April and June, 1865*. But where it appeared that certain soldiers of our army who when prisoners of war had enlisted in the enemy's service, had not attempted to escape when they might have done so, but had voluntarily remained and fought in the ranks of the enemy's army till forcibly captured by our forces, *advised* that their representations to the effect that they had joined the enemy to escape cruel treatment as prisoners of war, should not be allowed to weigh in their favor, but that they should be brought to trial for the crime of desertion to the enemy. XVI, 136, *May, 1865*.

#### PROFESSOR OF THE MILITARY ACADEMY.

**2066.** Sec. 1336, Rev. Sts., provides that "each of the professors of the Military Academy whose service at the academy exceeds ten years shall have the pay and allowances of colonel." Sec. 4 of the Army Appropriation Act of June 23, 1879, amends this section by inserting, after the word "service," the words "as professor." *Held* that professors who, at the passage of the last statute, were being paid as colonels because of having served at the academy ten years, but who had not yet served there *as professors* for that period, could not legally continue to be so paid, but were entitled to be paid as lieutenant colonels only until they had completed the term of special service contemplated by the act of 1879. XLII, 375, *August, 1879*.

2. The professors of the Military Academy do not belong to the staff of the army within the meaning of Sec. 1205, Rev. Sts., since they have no military rank or grade. 56, 151, *October, 1892*.

#### PROMOTION.

**2067.** Par. 19, Army Regulations (1862), prescribed that promotions in established regiments and corps to the grade of colonel should be made according to seniority, except in case of disability. Thus a senior first lieutenant, upon a vacancy occurring in the grade of captain in his regiment, is entitled (if not disabled or incompetent) to be promoted thereto. But where, in case of such a vacancy, a civilian (a dismissed officer) was nominated (illegally, *i. e.*, without authority of

(Congress) to the captaincy in the stead of the senior first lieutenant, but was thereupon confirmed by the Senate and commissioned. *Held* that the lieutenant was without remedy except such as he might obtain by application to Congress. XXIX, 47, *June, 1869.*

2068. Par. 20 of the Army Regulations (1863) prescribed that promotions to the grade of captain should be made regimentally. Section 1204, Rev. Sts., provides that "promotions in the line shall be made through the whole army, in its several lines of artillery, cavalry, and infantry, respectively." *Held* that this statute simply means that promotions shall be made within the branches of the service of the respective officers, *i. e.*, that infantry officers for example shall be promoted in the infantry arm, and not out of that arm and into another arm; and that it does not modify the rule laid down in the regulation but is declaratory of the same. Sec. 1204 is indeed not new law, but originates in a similar provision of s. 5, c. 108, act of June 26, 1812, viz.: "From and after the passage of this act, the promotions shall be made through the lines of artillerists, light artillery, dragoons, riflemen and infantry, respectively, *according to established rule.*" The established rule was that contained in a regulation of May, 1801, which prescribed, among other things, that "Promotions to the rank of captain shall be made regimentally" precisely the language retained in the existing regulation.<sup>1</sup> Of this regulation, therefore, Sec. 1204 is declaratory in the same manner as the act of 1812 was declaratory of the original regulation of 1801. XXXVII, 425, *March, 1876.* (See § 2072, *post.*)

2069. The act of June 18, 1878, sec. 13, in prohibiting for a time promotions and appointments in the army, added the proviso, "that this limitation shall not apply to the line of the army below the rank of captain." *Held* that the effect of this provision was to except subalterns from the general rule established by the statute, and that the promotion of a first lieutenant to a captaincy during the pendency of the prohibition was therefore legal. XLI, 400, *September, 1878.*

2070. An officer who is senior in his grade in his regiment is ineligible, while under a legal sentence of suspension from rank, to promotion to a vacancy occurring in a higher grade pending the term of his suspension. Upon such vacancy, the next senior officer becomes entitled to the promotion in his stead. XXXIII, 69, *June, 1872.*

2071. There is no vested right in promotion as such on the part of officers of the army. All that can be said is that officers have certain rights of promotion under whatever may be the law from time to time. These rights vary with the law. Congress may change the date of an

<sup>1</sup> See 14 Opins. At. Gen. 164.

officer's commission so as to give him a right of promotion over other officers who ranked him before, and so postpone their right to his. Thus, where an act of Congress authorized the President to issue a new commission to a lieutenant, the effect of which would be to give him a precedence over twenty four other officers, *held* that such legislation was within the power of Congress, which was the sole judge as to its expediency. And *held* that the giving of authority in such case, being one in which individual rights were concerned, was to be construed as a *requirement* upon the President.<sup>1</sup> 58, 309, *March, 1893.*

2072. The act of October 1, 1890, c. 1241, substitutes "lineal" for "regimental" promotion, except only as to officers who were first lieutenants at the date of the act. A second lieutenant becoming a first lieutenant after that date is entitled only to lineal promotion. He must give way to all those who are senior to him in the grade of first lieutenant in his arm of the service. When promoted, he is simply promoted to captain—of infantry, &c., not to captain of any particular regiment; and is then assigned to a regiment in the discretion of the Secretary of War. There is no question of *transfer* involved; an officer need not be transferred from one regiment to another, for promotion into the latter. 81, 387, *September, 1893.*

2073. By express provision of the act of July 30, 1892, c. 328, only such enlisted men of the army as are "citizens of the United States" may "compete for promotion" to the grade of second lieutenant. So *held* that a soldier who was not a citizen was not eligible for examination for promotion under the act, and could not become so eligible until he had been naturalized according to the existing law. 57, 155, *December, 1892.*

2074. The act of Congress approved July 30, 1892, relating to the promotion of enlisted men to the grade of second lieutenant prescribes, among other things, that before they can compete for promotion they "must have served honorably not less than two years in the army." *Held* that, in computing this period of service, an absence on furlough could not under the terms of the statute legally be excluded; and that therefore the Army Regulation (par. 30 of 1895) in so far as it provides for such deduction should be viewed as in conflict with the statute and inoperative.<sup>2</sup> Cards 1572, *July, 1895; 1939, December, 1895.*

2075. It is provided in Sec. 1257, Rev. Sts., that "when any officer in the line of promotion is retired from active service, the next officer in rank shall be promoted to his place, according to the established

<sup>1</sup> Supervisors v. U. S., 4 Wallace, 435.

<sup>2</sup> See this view adopted in decision circular 2, A. G. O., 1896.

rules of the service." One of these rules is that contained in par. 21, A. R. (1889), to the effect that "promotions \* \* \* will be made according to seniority, except in case of disability." An officer had himself applied to be retired on account of a certain disability, and had been ordered before a retiring board which had found him incapacitated. But before the President acted upon the report of the board a vacancy occurred in the grade next higher to that of the officer, to which, if qualified, he would have been entitled to be promoted by seniority. *Held* that, as the fact of disability clearly appeared in the case, though no final action had been taken in regard to the retirement, the officer could not legally be promoted. 43, 83, *September, 1890.*

2076. *Held* that a vacancy in the office of "chief medical purveyor"<sup>1</sup> should be filled, not by transfer from another office in the medical corps of equal rank, but by the promotion of the senior lieutenant colonel of the corps. 42, 331, *August, 1890.*

2077. A vacancy in the grade of quartermaster with rank of major having occurred in the Quartermaster Department, a military storekeeper in that department, who was the senior captain in the same, applied for the promotion. *Held* that the office of military storekeeper was no part of the permanent organization of that department, as constituted by the act of March 2, 1875, and was not one of the series of offices of the department to which the right of promotion under the law and regulations attached upon a vacancy, and that the claim must therefore be disallowed. Rank or grade is but an incident to office. Promotion is from office to office and as a consequence from grade to grade, and the law does not permit, in promotion, a separation of the office from the grade or rank. LV1, 683, *October, 1888.*

#### PROSECUTOR.

2078. Other than the judge-advocate, who by the 90th Article of War is "required to prosecute in the name of the United States," our military law and practice recognize no official prosecutor. The party who is in fact the accuser or the prosecuting witness, is, in important cases, not unfrequently permitted by the court to remain in the court room and advise with the judge-advocate during the trial, if the latter requests it; and in some cases he has been allowed to be accompanied by his own counsel. If such a party is to testify, he should ordinarily be the first witness examined: this course, however, is not invariable. II, 1, *June, 1861*; XXIX, 34, *June, 1869.*

<sup>1</sup> This office has been done away with by the operation of the act of July 27, 1892, c. 270.



## PROTEST.

**2079.** Where the majority of the members of a court martial have come to a decision upon any question raised in the course of the proceedings, or upon the finding or sentence, no individual of the minority, whether the president or other member, is entitled to have a *protest* made by himself against such decision entered upon the record. The conclusions of the court (except in cases of death sentences, where a concurrence of two-thirds is required) are to be determined invariably by the vote of the majority of its members, and it is much less important that individual members should have an opportunity of publishing their personal convictions, than that the action of the court should appear upon the formal record as that of the aggregate body, and should carry weight and have effect as such.<sup>1</sup> XI, 203, *December, 1864*; XXV, 542, *May, 1868*. Nor can a protest (against the finding or otherwise) by a minority of the members, be appended to the record, on a separate paper. XXXVI, 264; *February, 1875*.

## PUBLIC MONEY.

**2080.** *Held* that the amounts received from private parties as "compensation" for the use of the Des Moines Dry Dock, under the act of August 2, 1882, c. 375, were public money, and, in the absence of any authority for the purpose in this act or other statute, could not legally be expended without an appropriation by Congress. By Secs. 3617 and 3621, Rev. Sts., it is made the duty of every person, official or otherwise, to pay into the Treasury, "at as early a date as practicable," any public money coming into his possession. The deposit and keeping of public money, by disbursing officers, in places where there is no public depository, is regulated by the Secretary of the Treasury, under Sec. 3620, Rev. Sts. 39, 395, *March, 1890*.

**2081.** Where an officer in charge of certain river and harbor improvements exacted and received, from certain contractors for the work, sundry small sums of money claimed as due from them as amercements for damage or loss caused by them to the United States, *held* that such sums were public money of the United States, and that a failure to account for the same as such rendered the officer liable to a charge of embezzlement. 52, 138, *February, 1892*.

**2082.** *Held* that money received as rent or compensation for the use of portions of the water front of the Fort Canby reservation, Washington, for fish-traps, was public money and was to be accounted for

<sup>1</sup> See Simmons, § 469; Hough (Precedents), 703, note 4.

as such, and that it could not legally be turned into the "mess fund" for the purchase of vegetables for the post. 40, 72, *March, 1890.*

2083. Congress is vested by the Constitution with the exclusive power of disposition of the personal as well as the real property of the United States;<sup>1</sup> and by Sec. 8618, Rev. Sts., Congress has provided generally that the proceeds of sales of personal property of the United States shall be paid into the Treasury as "miscellaneous receipts." *Held* therefore that the various funds received at military posts, on military reservations or otherwise, as compensation for public property occupied, sold, or allowed to be used or appropriated, or for labor furnished, or privileges or facilities conceded, &c. (such as moneys received for rents of fisheries, for fallen timber, for surplus lumber, manure, &c., for metallic cartridge shells collected at target ranges, for grazing privileges, brickyard privileges, quarrying privileges, the privilege of cutting ice, repairs done to wagons, shoeing of teams, tolls for teams and wagons passing across reservations, &c., &c.), were public money of the United States, to be accounted for to the Treasury, and could not be legally retained as a so-called "slush fund," or disbursed for the use or benefit of the post or command. Otherwise, as to the proceeds of the sale of the savings from rations, or of the sale of any other company or regimental, &c., property. And money paid to a band for playing to citizens, being for a *quasi* personal service, may go to the band fund. But, while *de minimis non curat lex*, the proceeds of all *public property* of any material value, including all moneys exacted or received from civilians, are to be turned into the Treasury; and otherwise to dispose of them is embezzlement. 43, 208, *October, 1890; 52, 138, February, 1892.*

2084. The act of July 28, 1892, c. 316, authorizes the Secretary of War, in his discretion, to "lease for a period not exceeding five years, and revocable at any time, such property of the United States under his control as may not for the time be required for public use," such leases to be "reported annually to Congress;" but does not prescribe as to the disposition of the moneys received as rents. Sec. 3621, Rev. Sts., provides for the disposition of public moneys coming into the possession of any person, and par. 698, A. R. (1889), directs that "the face of the certificate or receipt" shall "show to what appropriation" the funds belong. *Advised* that it would be sufficient for any post quartermaster or other disbursing officer into whose hands such rents should come, to note the character of the payment upon his certificate, leaving it to the War Department to report the same in the aggregate to Congress at the end of each year. 59, 369, *May, 1893.*

<sup>1</sup> U. S. v. Nicoll, 1 Paige, 646 (Fed. Cas., 15,879).

## PUBLIC PRINTING.

2085. *Advised* that, under the prohibitory provisions of the act of July 7, 1884, c. 332, a work entitled the "Manual of Calisthenics" cannot legally be authorized or caused, by the Secretary of War, to be printed by the Public Printer, unless the same be, in the words of the act, "necessary to administer the public business." The term "necessary" has been construed, in similar connections, as meaning—not absolutely necessary, but reasonably necessary or clearly conducive, to the object expressed. (See the Legal Tender Cases, 12 Wallace, 457, 539.) The Secretary of War should be assured that the proposed publication would clearly and materially conduce to the due administration of the public business, before causing the printing to be done by the Public Printer. 50, 442, *December, 1891*. Similarly *advised* in regard to a translation, by an artillery officer, from the Russian, of lectures on the subject of the "Resistance of Guns and Interior Ballistics"; a precedent being cited of a work by a surgeon of the army, entitled "Notes on Military Hygiene", held by the Secretary of War (April, 1890) to be valuable though not *necessary* in the sense of the statute. 50, 444, *December, 1891*.

2086. *Held* that the Secretary of War "is authorized by law" (see public printing and binding act, of January 12, 1895) to have the Commissary's Hand Book, or any other similar work needed in the business of the War Department, printed at the Government Printing Office and paid for from the War Department's allotment of the appropriation for "public printing and binding". Card 1679, *August, 1896*.

## PUBLIC PROPERTY.

2087. The Constitution—Art. IV, Sec. 3, par. 2—provides that "the Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States." The scope of this provision is most comprehensive: the authority conferred thereby upon the legislative branch of the Government being held to extend from the formation of a Territorial government to the matter of the sale of a small amount of personalty. That neither land nor any interest in land of the United States can be sold or otherwise disposed of by the head of an executive department or other executive official or by a military officer, without the authority of Congress, is settled law.<sup>1</sup> VII, 404, *March, 1864*;

<sup>1</sup>This fundamental rule of our public law is expressed by Attorney General Hoar (13 Opins., 46), as follows: "I am clearly of opinion that the Secretary of War can not convey to any person any interest in land belonging to the United States, except in pursuance of an act of Congress expressly or impliedly authorizing him to do so." And see *United States v. Nicoll*, 1 Paine, 646 (Fed. Cas., 15,879), *Seabury v. Field*, *McAllister*, 1; *United States v. Hare*, 4 Sawyer, 653, 669.

XXIII, 135, *July, 1866*; XXX, 605, *August, 1870*; XXXV, 397, *April, 1874*; XLII, 283, *May, 1879*; LIV, 609, *February, 1888*. In the absence of such authority, the lands of the United States, whether held by original proprietorship, or acquired by purchase or gift, or by conquest, cannot, even for a purely benevolent or religious purpose, be given away any more than they can be transferred for a valuable consideration. XXXIX, 337, *December, 1877*. Nor (without such authority) can they be conveyed temporarily by *lease*, whether for a short or long term.<sup>1</sup> XXXII, 2, *May, 1871*; XXXIX, 336, *December, 1877*; XLII, 230, *March, 1879*.

2088. Nor, without authority from Congress, can an executive department or officer convey away any *usufructuary interest* in land of the United States. Thus it has been repeatedly held by the Judge-Advocate General that the Secretary of War (or a military commander) was not empowered, of his own authority, to grant a right of way over a military reservation to a railroad company or other corporation.<sup>2</sup> XXXI, 237, *March, 1871*; XXXIV, 197, 470, *March and September, 1873*; XXXV, 554, *August, 1874*; XXXVI, 207, *January, 1875*; Card 241, *August, 1894*. And such rights when given by Congress, can be exercised only within the terms of the grant. Thus where by an act of Congress there was granted to a railroad company a limited and defined right of way across a military reservation (occupied by a military post), *held* that the company was authorized simply to construct a track or roadway, and was not empowered to put up depots, stock yards, cattle pens or other erections upon the land, or to appropriate land otherwise than for the roadway.<sup>3</sup> XLI, 214, *April, 1878*; XLII, 187, *March, 1879*. So *held* that the Secretary of War could not, of his own authority, grant, in consideration of the payment of toll to the United States, a right of way over a bridge belonging to the United States. XXXI,

<sup>1</sup>See *Friedman v. Goodwin*, 1 McAllister, 148, where a lease made, by the post commander at San Francisco, of a part of a "government reserve," though approved by the military governor of the then Territory and also by the Secretary of the Interior, was held void because not authorized by Congress. The court declares the "utter impotency of any attempt by an officer of the Government to alien any land, the property of the United States, without the authority of an act of Congress," adding that "the President with the heads of the departments combined" could not effect such an object. And see 4 Opns. At. Gen., 480, 9 *id.*, 476, 13 *id.*, 46, *United States v. Hay*, 4 Sawyer, 670-1. In the last case the court says: "The Secretary of the Treasury cannot execute or approve of a lease of any property belonging to the United States without special authority of law."

But see now the act of July 28, 1892 (27 Stats., 321), which gives the Secretary of War authority to lease for a period not exceeding five years and revocable at any time, public property under his control (except mineral and phosphate lands), not for the time required for public use.

<sup>2</sup>In numerous statutory enactments such a right has been expressly given by Congress as the only authority competent for the purpose.

<sup>3</sup>See this opinion affirmed by the Attorney General in 14 Opns., 135.



136, *January, 1871*; XXXVIII, 41, *April, 1876*. So *held* that the Secretary could not legally grant to a company or individual the right to erect and maintain for an indefinite period a hotel on the military reservation at Sandy Hook.<sup>1</sup> XXXVIII, 351, *November, 1876*. So *held* that the Secretary would not be authorized to transfer a lot belonging to the United States in Washington to the Commissioners of the District of Columbia for the erection of a hospital. XXXVI, 668, *September, 1875*. So *held* that neither the Secretary of War nor a department commander could grant to an individual or individuals the exclusive right to use for an indefinite period certain water power belonging to the United States (XLI, 136, *February, 1878*); nor the exclusive right to mine the soil of a military reservation for a certain term of years (XLI, 37, *November, 1877*); nor a similar right to make and maintain for an indefinite period ditches through a portion of such a reservation for the purpose of irrigating the lands of private parties (XXXVIII, 232, *August, 1876*); nor the right annually to enter upon and occupy a military reservation and cut and possess the hay crop growing thereon<sup>2</sup> (XLII, 128, *January, 1879*); nor the right permanently or indefinitely to occupy and use a portion of a reservation for a burying ground. XXXIX, 337, *December, 1877*.

2089. *Held*, however, that a distinction was to be observed between a grant of a usufructuary interest in land and a revocable *license*, not involving a transfer of such an interest.<sup>3</sup> XXXIII, 657, *January, 1873*; XXXIV, 196, *March, 1873*; XLIII, 278, *April, 1880*. Thus *held* that the Secretary of War would be authorized to permit a telegraph company to erect posts upon a military reservation and attach to the same telegraph wires, subject to their being removed at the will of the Government if found to interfere with the purposes for which the reservation was established. XXXVIII, 591, *May, 1877*. So *held* that a municipal corporation might legally be permitted by the Secretary of War to lay water pipes in the soil of the arsenal grounds at Springfield, Mass., the same being equally for the benefit of the military authorities and the citizens, and subject to removal at the

<sup>1</sup> See confirmatory opinion of the Attorney General in 16 Opins., 205. In this case there was the further objection that the State of New Jersey, in ceding to the United States jurisdiction over the premises, by deed of March 10, 1846, had expressly declared that the grant was "for military purposes;" adding, "and the said United States shall retain such jurisdiction so long as the said tract shall be applied to the military or public purposes of the said United States, and no longer."

<sup>2</sup> A portion in regard to growing timber. See *Spencer v. United States*, 10 Ct. Cl., 255.

<sup>3</sup> See this distinction recognized in opinions of the Attorney General of October 1 and November 22, 1878 (16 Opins. 152, 205), in the former of which it was held that the Secretary of the Navy was not empowered to authorize the City of Chelsea, Mass., to continue one of its main sewers through the grounds of the U. S. Naval Hospital.

will of the Government. XXXVI, 653, *August, 1875*. And *held* that a post trader might legally be licensed by the Secretary of War to erect the buildings necessary for his business upon the land of the post for which he was appointed.<sup>1</sup> XXXIII, 453, *October, 1872*; XXXV, 78, *December, 1873*. But *held* that the Secretary of War was not empowered to accede to the application of an individual to establish a ferry across a river within the limits of a military reservation, where what was asked was not a mere license revocable at the will of the Secretary but a permanent franchise and grant of an exclusive usufructuary interest in the premises, including even the right to charge tolls to the United States. XXXVIII, 564, *April, 1877*; XXXIX, 457, *March, 1878*; XLII, 454, *December, 1879*. And similarly *held* in a case of an application to be permitted to erect and maintain a permanent bridge across a river forming a boundary of a military reservation, one end of which was to be built upon the soil of the reservation; the application contemplating not a mere license revocable at the will of the Government, but a permanent right of property in the bridge involving an easement in the land. XLIII, 167, *January, 1880*. Also similarly *held* where the application was to bore for gas on a military reservation and for the exclusive privilege of piping and disposing of the same, if found in paying quantities. Card 285, *September, 1894*. (See LICENSE.)

2090. The provision of the Constitution in regard to the disposition of public property applies to *personally* equally as to *realty*. Thus no executive department or officer can be empowered, except by the authority of Congress, to dispose of personal property of the United States.<sup>2</sup> XXX, 605, *August, 1870*; XXXVIII, 11, *December, 1875*;

<sup>1</sup> See 14 Opins. At. Gen. 125.

<sup>2</sup> The leading case on this point is *United States v. Nicol*, 1 Paine, 646 (Fed. Cas., 13,879), in which it was held that a sale or loan, by the commandant of an arsenal, of a quantity of *lead* belonging to the United States, was illegal and invalid. The court says: "The Constitution declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' No public property can therefore be disposed of without the authority of law, either by an express act of Congress for that purpose, or by giving the authority to some department or subordinate agent. No law has been shown authorizing the sale of this lead; nor is any such authority to be inferred from the general power vested in any of the departments of the Government. The power, if lodged anywhere, would seem most appropriately to belong to the War Department. But there is no such express or implied power in that department to sell the public property put under its management." And see the same principle recognized in an opinion of the Attorney General (16 Opins. 477), in which it is held that the Secretary of War was not empowered to sell *arsenic* to a State, in the absence of authority from Congress.

In certain emergencies, however, the use of property of the United States to relieve suffering among persons not entitled to such aid has been authorized by the President, and similarly the Army Regulations contain provisions with reference to the care of certain sick persons not entitled to such care; but there is no authority of law for this. It can only be said to rest on the *necessity* of furnishing relief in such cases. See note to § 2300, *post*.

Cards 148, *August, 1894*; 1299, *May, 1895*; 8555, 8679, *October and November, 1897*; 5008, *September, 1898*. So *held* that the Secretary of War would not be authorized, in the absence of enabling legislation, to sell or negotiate the bonds or promissory notes made to the United States by certain railroad companies, in consideration of rolling stock, &c., sold and transferred to the same. XXX, 605, *August, 1870*. And *held* that the fact that certain valuable public property was perishable and liable to waste was not legally sufficient to justify the sale in the absence of statutory authority. XXVIII, 479, *April, 1869*. *Held* that the "Cavalry Tactics," a work prepared under the orders of the Secretary of War by a board of officers, was the property of the United States, and therefore could not, without the authority of Congress, be disposed of to a bookseller with a view to its publication and sale by him on his private account. XXXV, 264, *March, 1874*. And *held* that the telegraph lines of Porto Rico, which by the Treaty of Paris, became the property of the United States, could not be alienated except by authority of Congress. Card 8097, *April, 1900*.

2091. Under par. 616, A. R. (698 of 1901), "transfers of public property from one bureau or department to another is not regarded as a sale."<sup>1</sup> Paragraph 671 (752 of 1901) requires for such transfer "special authority of the Secretary of War" and provides that "when between a bureau of the War Department and any other executive department the amount to be paid will include the contract or invoice price, and cost of transportation." The amount thus determined should be transferred as indicated on page 602, volume 3, Decisions of the Comptroller of the Treasury. *Held* that a transfer of certain clothing from the Quartermaster's Department to the Department of Justice for the use of prisoners in the U. S. Penitentiary at Fort Leavenworth, could legally be made under the provisions of the regulations cited; the latter department having an appropriation made by Congress for the purchase of clothing for the prisoners named. Card 7184, *October, 1899*. Similarly *held* with respect to a proposed transfer of five mules purchased from the appropriation for river and harbor improvements, to the Quartermaster Department of the army. Card 3679, *January, 1898*.

2092. The provision of the Constitution in regard to the disposition of public property applies to exchanges as well as to other dispositions thereof. The exchange of public property for other property not belonging to the United States cannot therefore be made, except by the authority of Congress. Cards 613, *November, 1894*; 1223, *April, 1895*; 2127, 2183, *March and April, 1896*; 3414, *August, 1897*.

<sup>1</sup> See 17 Opin. At. Gen. 490

**2093.** The exchange of a lighthouse reservation for a military reservation by the Treasury and War Departments, would not be legal without the authority of Congress, but *advised* that it would be in accordance with precedent for each department to give to the other a license to occupy the lands of that department pending action by Congress. Cards 8657, *November, 1897*; 8743, *August, 1900*.

**2094.** The term "surplus documents," as used in section 95 of the public printing and binding act of January 12, 1895, has reference to public documents printed by the United States, and does not refer to law books purchased by and become the property of the United States. These latter cannot be exchanged under the section referred to. Card 2183, *April, 1896*.

**2095.** Requests for the *loan* of tents, flags and other public property under the control of the War Department have as a rule been denied on the ground that the Secretary of War had no authority to loan public property under his control unless authorized to do so by resolution or act of Congress.<sup>1</sup> While there have been instances in which dredges and other public property used for the improvement of navigation have been loaned under authority of the War Department, the practice has been, with few exceptions, in accordance with the view that, in the absence of authority from Congress, the Secretary of War cannot legally loan personal property of the Government. Card 1561, *July, 1895*; 2235, *May, 1896*. *Held*, therefore, that in the absence of Congressional authority government ambulances could not be loaned to the national guard of a State for use on a practice march. Card 1561, *supra*. But *held* that it was within the discretion and power of the Secretary of War to temporarily furnish transportation and an escort for a United States judge, on his request, while traveling from place to place for the purpose of holding court in the Indian Territory. Such use would not be a loan. Card 228, *August, 1894*.

**2096.** Under the provisions of the act of March 3, 1879 (20 Stats., 412), the Secretary of War is, upon the request of the head of any department, authorized and directed to issue arms and ammunition whenever they may be required for the protection of public money and property, to any officer of the department designated by the head thereof, to be returned when the necessity for their use has passed. *Held* that under this statute the Secretary of War could furnish arms and ammunition, upon the request of the Secretary of the Interior, to an Indian agent for use of his police to meet any threatened armed opposition that might arise in the attempt of the agent to evict trespassers from the reservation under his charge. Card 1419, *June, 1895*.

<sup>1</sup> Such action, for example, was taken by the War Department, Jan. 16, 1881, on a request for the loan of tents for a camp meeting, and again on June 24, 1895, on a request for the loan of flags to be used at an encampment.



**2097.** *Held* that the principle that buildings erected on the land of another without his consent become his property, did not apply to buildings erected by the United States on land occupied *jure belli* by the army in an enemy's country; but that, on subsequently surrendering the land to the owner, the military authorities might legally remove and retain or dispose of the buildings. XXXV, 565, *September, 1875*.

**2098.** Temporary buildings erected by military orders on land of the United States at a military post, to serve only a temporary purpose, are in general personal property of the United States which may be removed by the direction or authority of the Secretary of War.<sup>1</sup> But if the same be permanent structures and real estate, the authority of Congress is necessary to their removal. 58, 162, *February, 1893*.

**2099.** The United States, being tenant of land leased for military purposes at Fort Davis, Texas, erected buildings thereon for the purposes of a military post. In view of the fact that the relation was that of landlord and tenant; that the buildings were erected for a purpose analogous to that of trade, and for a public use; and that in their erection there could certainly have been no intention to benefit the inheritance or add to the freehold—*held* that such buildings were to be regarded not as fixtures but as personal property,<sup>2</sup> and removable by the tenant at any time before the expiration of his lease.<sup>3</sup> Should the Government sell the buildings standing, the purchaser would have the same right of disposition as the United States and no more. He would therefore be obliged to remove them before the termination of the lease, unless otherwise permitted by the owner of the premises. 47, 71, *May, 1891*. And *held* similarly of like buildings erected at Fort Union, New Mexico, where the United States was tenant at will; the buildings not being intended as improvements, but merely for the use of the troops. 47, 138, *May, 1891*.

**2100.** Where a post commander, without authority, took possession of land of the United States for the purpose of erecting thereon a building for his personal use, and having erected it assumed to hold and dispose of it as his own property, *held* that his act was unauthorized and illegal, and that he acquired no legal estate in the building. And similarly *held* where, without authority, he permitted an enlisted

<sup>1</sup> But such buildings cannot be *sold* without the authority of Congress. *Lear v. U. S.*, 50 Fed. Rep., 65.

<sup>2</sup> *Van Ness v. Pacard*, 2 Peters, 141; *King v. Wilcomb*, 7 Barb., 263; *Hutchins v. Masterson*, 46 Texas, 555; *Moody v. Aiken*, 50 Texas, 65; *Conrad v. Saginaw Mining Co.*, 54 Mich., 249; *Meigs' Appeal*, 62 Pa. 81, 28.

<sup>3</sup> *Sumner v. Tibston*, 4 Pick., 307; *Griffin v. Ramsdell*, 71 Ind. 441, 18 Opins. At. Gen., 270; *Taylor's Landlord and Tenant*, 433. But such buildings could not be *sold* without the authority of Congress. 20 Opins. At. Gen., 264.

man of his command to use land of the United States for the erection thereon of a dwelling and to hold and dispose of such dwelling as his own property. 63, 64, *December, 1893.*

2101. Wood growing on a military reservation is the property of the United States. So, *held* that a contractor who cut such wood to fill a contract made by him with the United States to furnish wood to a military post, could not legally be allowed to remove or dispose of the same as his own property. 48, 218, *July, 1891.*

2102. *Held* that the provision of Sec. 3618, Rev. Sts.,—requiring that "all proceeds of sales of old material, condemned stores, supplies, or other public property of any kind," shall, with certain exceptions specified, be deposited and covered into the Treasury as miscellaneous receipts, and not withdrawn except by the authority of a statutory appropriation,—applied to the proceeds of the surplus cuttings of material for clothing manufactured by the Quartermaster Department of the army, the same not being within any of the designated exceptions; and therefore that the proceeds of such cuttings could not legally be retained and used in the business of that department. XLII, 653, *May, 1880.*

2103. Unserviceable public property can only be disposed of by sale according to the provisions of Secs. 1241, 3618, Rev. Sts. It cannot be exchanged for other property not belonging to the United States. Thus *held* that an old and useless printing press, the property of the United States, could not be disposed of by exchanging it for certain new property belonging to a regiment. 62, 124, *October, 1893.*

2104. *Held* that, in the absence of specific authority from Congress, the Secretary of War would not be empowered to sell to a State, for the use of its militia, an amount of clothing in excess of the State's quota as already appropriated. 42, 371, *August, 1890.* And *held*, that, without such authority, he would not be empowered to exchange government property for property owned or possessed by a State; thus, that he could not legally deliver to the State of Pennsylvania certain arms, the property of the United States, in exchange for arms formerly issued to the State for the use of its militia, and in which the State had a qualified property. 41, 497, *July, 1890.*

2105. In the absence of statutory authority, land cannot be purchased *for* the United States with any more legality than land of the United States can be sold or disposed of. By a provision of an act of May 1, 1820, now contained in Sec. 3736, Rev. Sts., it is declared that "no land shall be purchased on account of the United States except under a law authorizing such purchase." *Held* that the term "purchase" was to be understood in its *legal* sense, as embracing any

mode of acquiring property other than by descent;<sup>1</sup> and that therefore the Secretary of War would not be empowered to accept a *gift* of land or interest in land, for any use or purpose independently of statutory authority.<sup>2</sup> XXXII, 19, *September, 1871*; XXXVIII, 175, *July, 1876*; XXXIX, 313, *November, 1877*; XLIV, 9, *June, 1880*; Card 3896, *February, 1898*. And similarly held as to the construction of the same word ("purchase") as employed in Sec. 355, Rev. Sts., and advised that an appropriation of public money could not legally be expended for the erection of a public building upon land *donated* to the United States, until the Attorney General had approved the title, and the legislature of the State in which the land was situated had given its consent to the grant.<sup>3</sup> XXXII, 19, *supra*; XXXIX, 313, *supra*; XLII, 452, *December, 1879*.

2106. In view of the prohibition of Sec. 3736, Rev. Sts., that "no land shall be purchased on account of the United States, except under a law authorizing the same," the Secretary of War cannot accept a grant by *gift* of land or of an easement in land, without authority of special statute.<sup>4</sup> XLV, 359, *June, 1882*; 40, 447, *May, 1890*; 43, 70, *September, 1890*. And held that, in the absence of authority from Congress, a purchase of lots in a city cemetery, for the burial purposes of a neighboring military post, would not be legal or operative. 31, 426, *April, 1889*.

2107. The statutory authority relied upon for the purchase of land by a head of a department should be clear and indisputable. Thus held that authority to purchase additional land for the interment of soldiers could not be derived from the general provision of the annual appropriation act, appropriating a certain sum for maintaining the existing national cemeteries. XLI, 50, *November, 1877*.

2108. A statute conferring a specific authority to purchase certain

<sup>1</sup> See 7 Opins. At. Gen. 114, 121, *Ex parte Hebard*, 4 Dillon, 384.

<sup>2</sup> See this opinion concurred in by the Attorney General, in 16 Opins. 414. As statutes specially authorizing the acceptance of donations of land, note the early acts of March 20 and May 9, 1794, and, later the acts of Feb. 18, 1867; March 3, 1875; June 23, 1879. That authority, however, to purchase, and, *a fortiori*, perhaps, to accept a gift of, the necessary land, may be implied from an appropriation act granting a sum of money for a public work requiring for its construction the occupation and use of certain land of an individual or corporation, see opinions of the Attorney General in 15 Opins. 212, 16 *id.* 119, 387. In the opinion in 16 Opins. 119, it was held that where no statutory authority whatever existed for accepting a gift of land, a head of department would not be justified in accepting the same on the condition that Congress ratify the acceptance and in anticipation of such ratification.

<sup>3</sup> But under the implied authority contained in Sec. 1835, Rev. Sts., lands required as sites for forts, arsenals, &c., or useful public buildings, may be purchased or acquired by gift without the consent of the State, though, in the absence of such consent, public money cannot, in view of the provisions of Sec. 355, legally be expended upon the buildings. 10 Opins. At. Gen. 35, 15 *id.* 212.

<sup>4</sup> But by act of April 24, 1888, the Secretary of War is expressly empowered to purchase, or accept donations of, land for river and harbor improvements.

land should, in the exercise of the authority, be strictly construed. Thus where a statute authorized the Secretary of War to purchase, for a certain stated sum, a certain described tract containing a specified number of acres, *held* that the act did not invest him with discretion to purchase a portion only of such tract. XXXVIII, 346, *October, 1876*.

2109. Authority to acquire land in a State, by the exercise of the right of eminent domain, whether by proceedings for condemnation in the U. S. Circuit Court or in the courts of the State,<sup>1</sup> can be vested in an executive official of the United States, only by express legislation of Congress. XLII, 63, *December, 1878*.

2110. A State can have no authority to appropriate land included in a military reservation of the United States to the purposes of a right of way for a railroad.<sup>2</sup> Such a right of way granted by a State legislature, cannot be recognized as legal by the United States. XXXI, 249, *March, 1871*.

2111. Where conflicting claims, not clearly groundless, were made by several persons to the title to a portion of a military reservation, *advised* that the Secretary do not attempt to pass upon the questions involved, but refer the parties to the courts for their legal remedies. XXX, 72, *February, 1870*. (See § 766, *ante*.)

2112. A statute may grant title, and a statutory grant is equivalent to a patent—is, in fact, in the words of Attorney General Bates, "the highest and strongest form of title known to our law."<sup>3</sup> Thus where a statute vests in terms in an individual or corporation the title of the United States to certain land or other public property, in occupation or charge of the military authorities, no deed or conveyance from the Secretary of War is necessary; all that is required being that the proper military commander or officer relinquish or turn over the premises or property to the grantee. XXXVII, 596, *June, 1876*; XLI, 28, *October, 1877*. And where the grant by the statute is made upon a condition precedent, the title, upon the condition being performed by the party, becomes complete without any written deed. Thus where an act of Congress granted to a railroad company certain land for buildings and a right of way within the limits of a military reservation, upon the company's filing with the Secretary of the Interior a map of its route to be approved by him, and also locating, under the direction of the Secretary of War, the land required for its buildings and roadway; *held* that, upon these conditions being duly

<sup>1</sup> See *Kohl v. United States*, 1 Otto, 367.

<sup>2</sup> See *United States v. R. R. Bridge Co.*, 6 McLean, 517; *Ills. Central R. R. Co. v. United States*, 20 Law Rep. 630; 6 Opins. At. Gen. 670, 16 *id.*, 114.

<sup>3</sup> 11 Opins. At. Gen. 49. And see 9 *id.* 346; 12 *id.* 254, *Terrett v. Taylor*, 9 Crauch, 50.



performed, a complete title vested in the company. XXXVI, 130, *December, 1874.*

2113. The Constitution vests in Congress the exclusive power to dispose of the property of the United States, real or personal.<sup>1</sup> The Secretary of War, in the absence of authority from Congress, cannot alienate land of the United States. Thus, where a Company proposed to cut out and remove a part of a dam (some one hundred and forty feet) on Fox River, Wis., belonging to the United States, and to substitute another, as a private improvement, below, — *held* that this was a proposition for the alienation by an executive official of public property and could not legally be entertained. 29, 259, *January, 1889.*

2114. The title to lands purchased on account of the United States is not properly assured by a certificate of "no liens", signed by the attorney who made the abstract of title. The proper person to make such a certificate is the custodian of the records of judgment and other record-liens in the county in which the land is located.<sup>2</sup> 33, 292, *July, 1889.*

2115. *Held* that the title and possession of the United States to and of land situate at El Paso, Texas, duly purchased for cemetery purposes, would properly be protected against a continuous trespass on the part of the municipality in cutting a street through the land, by an injunction sued out in the proper court, the remedy by suit for damages being inadequate.<sup>3</sup> XLIX, 240, *July, 1885.*

2116. The State of North Carolina ceded to the United States, by an act of its legislature of 1794, the land of the present military reservation at Southport, N. C., the site of old Fort Johnson. A condition of the deed of cession was to the effect that a fortification should be erected on the land within three years and be maintained forever thereafter for the public service, or the land should revert to the State. The time allowed was repeatedly extended, the last extension expiring in 1815, when a fortification had been constructed if not fully completed. The fort has long since ceased to be garrisoned. In 1889 an individual citizen 'entered' the site as State land. *Held* that this act was without legal authority or effect; that the condition subsequent in the deed was one of the breach of which the grantor, the State, could alone take advantage; and that, as the State had not proceeded to re-enter for such breach, the United States was not ousted and could legally continue to hold the premises.<sup>4</sup> 36, 107, *October, 1889.*

<sup>1</sup> 16 Opina. At. Gen. 477.

<sup>2</sup> See G. O. 47 of 1881, for Attorney General's Regulations as to making deeds, proving title to lands, &c.

<sup>3</sup> Pomeroy, Eq. Jur. §§ 138, 1347, 1356.

<sup>4</sup> See *Schulenberg v. Harriman*, 21 Wallace, 44.

2117. Except the State, War and Navy Building, provided for by a separate statute, of March 3, 1883, the other buildings owned by the United States and occupied by the War Department are not found to have been taken from the charge of the Chief of Engineers. The fact that a "superintendent of building" is authorized, as in the case of the appropriation for the Record and Pension Office, would not take the building from the general charge devolved upon the Chief of Engineers by Sec. 1797, Rev. Sts. 60, 237, *June, 1893*.

2118. When a general deposit is made in a bank, the depositor parts with the title to the money deposited and takes in the place of it a credit. This credit is a *chose in action* and is "property." This kind of property when belonging to the United States may, under par. 585, A. R. (489 of 1895; 506 of 1901), be protected like any other property. Card 3149 *September, 1894*.

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## R.

### RAILROAD COMPANY.

2119. Where a railroad has been placed in the hands of a receiver, the custody and control of the property are in the court, and the receiver has no power, without the previous direction of the court, to incur any expense except those absolutely necessary for the preservation and legitimate use of the property.<sup>1</sup> 60, 118, *June, 1893*.

2120. An incorporated railway company cannot effect a consolidation with another such company without a transfer of its franchise, which cannot be legally transferred without the consent of the State which granted it. 60, 455, *December, 1891*. Where a railway company has been incorporated by act of Congress, it cannot transmit the existence, thus given, to, or confer it upon, a consolidated company, without the authority of Congress. 51, 11, *December, 1891*. A corporation is an artificial person owing its existence to the sovereignty of the State, and it cannot assume to dissolve itself and at the same time re-create itself as part of a consolidated company without the assent of the sovereignty which created it. And such assent cannot be implied but must be given by special act of the legislature.<sup>2</sup> 51, 47, *December, 1891*.

<sup>1</sup>Cowdrey v. Galveston, etc., R. R. Co., 93 U. S., 352.

<sup>2</sup>Taylor on Private Corporations, § 419; Waterman on Corporations, vol. 1, p. 557; Morawetz on Private Corporations, § 543.

**2121.** The Sundry Civil Act of March 3, 1899 (30 Stats., 1108), contains the provision "that no railroad shall be permitted upon the right of way which may have been acquired by the United States to a national cemetery, or to encroach upon any roads or walks constructed thereon, and maintained by the United States." *Held* that this provision was intended to prevent the occupation of and encroachment upon the rights of way or roads named therein; but did not forbid the granting of permission to lay a railroad track across a government roadway leading to a national cemetery. Card 7466, *December, 1899.*

## RANK.

**2122.** Where the appointment or commission of an officer specifies a particular date from which he is to rank, which is prior to the date of the formal execution of the instrument, it is the former date which fixes his relative rank in the army.<sup>1</sup> XXIII, 439, *April, 1867.*

**2123.** Under the existing statute law, an officer of the army can claim rank or precedence by virtue of service as a *volunteer* officer only as between himself and another officer of the same grade and date of appointment or commission—the case provided for in Sec. 1219, Rev. Sts. The 123d Article of War is operative to regulate the relative rank, &c. of regular and volunteer officers only when serving together in the army—as during the civil war, for example—as distinctive classes of commissioned officers.<sup>2</sup> XII, 238, *May, 1878.*

**2124.** *Held* that, in fixing his rank in relation to another officer of the same grade and date of commission, under Sec. 1219, Rev. Sts., an officer was entitled to have taken into account a period of service rendered by him "as a commissioned officer of the United States" in the volunteer force during the Mexican war; the provision of the second sentence of the section not being viewed as limiting the application of the general and comprehensive provision of the first sentence. XXXIX, 609, *July, 1878.*

**2125.** In fixing the relative rank of officers of the *same* grade and date of appointment, by reference to time of service, under Sec. 1219, Rev. Sts., it is the time of service as a commissioned officer in the army that is alone to be taken into consideration. Service in the navy is not to be computed. 40, 51, *March, 1890.* A second lieutenant of infantry, appointed in the army, October 10, 1883, claimed, by

<sup>1</sup> Except as between himself and an officer of the grade whose appointment or commission gives rank from the *same date* as does his own, in which case the rule prescribed by Sec. 1219, Rev. Sts., governs.

<sup>2</sup> See, to a similar effect, an opinion of the Attorney General, in 15 Opins. 330. See also note 1 to § 408, *ante*.

reason of service as a cadet of the Naval Academy from 1876 to 1883, a precedence over all second lieutenants of his date of appointment, and the right to have his name placed in the register accordingly. *Held* that the claim should be disallowed, since a naval cadet is not a commissioned officer and not within the application of Sec. 1219, Rev. Sts. LV, 672, *June, 1888*.

**2126.** In the case of two brigadier generals of volunteers, officers of the regular army, whose commissions bore the same date, and whose prior service as commissioned officers had been continuous, *held* that their relative rank should be determined by the dates of their original entry into service, and this under the practice of the War Department is determined by the date of acceptance of the original commission. Card 4254, *June, 1898*.

**2127.** The general rule is that relative rank in the army is regulated by the actual rank held by the officer in his corps, and this by the date given him in his commission in such corps. If an officer has, immediately preceding his present commission, held the same rank in another corps, this will not give him increased rank in his present corps, nor corresponding relative rank. To this rule a noticeable exception is presented by par. 42, A. R., relating to transfers of officers, as amended by G. O. 47 of 1891. This order does not restrict the officer's rank to the rank of his present commission, but gives him the benefit of prior rank back to the date of the commission of the junior officer previous to the transfer. The order seems to be based upon the intention of giving officers the benefit of their previous rank so far as it can be done without injury to others, and yet this intention has been practically limited to the case of voluntary transfers or exchanges. 60, 210, *June, 1893*. (See 52 A. R. of 1901.)

**2128.** An officer was appointed second lieutenant of an infantry regiment, June 15, 1868, and this date fixed also his relative rank as to other second lieutenants of the army. Under the act of March 3, 1869, consolidating his regiment with another infantry regiment, he became supernumerary, and was assigned to a cavalry regiment, July 14, 1869, and recommissioned as a cavalry lieutenant as of the latter date. *Held* that he should have been so recommissioned as of the date of his original appointment.<sup>1</sup> 38, 295, *February, 1890*.

**2129.** The relative rank of officers of the same grade and date of appointment or commission is determined "by the time which each may have actually served as a commissioned officer", when these periods are unequal. This being the rule under Sec. 1219, Rev. Sts., and army

<sup>1</sup>It was held otherwise in this case by the Attorney General (16 Opins. At. Gen. 291) whose views were not concurred in.



regulations, it should not be set aside by assignment of dates in the nomination and confirmation.<sup>1</sup> Cards 2805, *December, 1896*; 7449, *December, 1899*; 7790, 7869, *March and April, 1900*.

**2130.** Fifteen candidates for assistant surgeons in the regular army having passed the required examination were, on December 13th, 1898, nominated to the Senate, and, on Dec. 24th following, were duly commissioned with rank as first lieutenants from Dec. 12, 1898. There was examined with them another candidate who passed in professional requirements, but failed physically. He was subsequently reexamined physically and on June 14, 1899, was given a recess appointment as assistant surgeon with rank as first lieutenant from that date. On a recommendation that, if practicable, he be commissioned with the rank of first lieutenant to date from Dec. 12th, 1898, and that his name be placed on the register in accordance with the merit roll on file in the Surgeon General's Office, *held*, that it would require an act of Congress to carry such recommendation into effect. Card 7449, *December, 1899*.

**2131.** The act of March 3, 1899, making appropriations for the support of the regular and volunteer army, appropriated a certain sum to pay the company and regimental officers of the special immune regiments (volunteer army of 1898) for certain time that elapsed after they had reported for duty and prior to their being commissioned. *Held* that this time should not be counted as part of the time which each may have served as a commissioned officer, in fixing relative rank between officers of the same grade and date of appointment and commission under sec. 1219, Revised Statutes and par. 11, of the Army Regulations. They were not "commissioned officers of the United States" prior to being "commissioned;" and therefore no time prior to their being commissioned should be counted as time actually served as commissioned officers of the United States. The appropriation act simply provided for their being paid for time lost by them after reporting at the place of rendezvous and prior to their becoming officers of the army; was indeed a recognition of the fact that they were not in the service during the period named.<sup>2</sup> Card 7050, *September, 1899*; *October, 1900*.

#### RECOMMENDATION.

**2132.** A recommendation of the accused to clemency is no part of the official record of the trial, or of the proceedings of the court as

<sup>1</sup> It was held however by the Secretary of War under date of March 12, 1900, that where the date of rank as given in the commission had been fixed by the joint action of the President and Senate, it could not be changed except by authority of an act of Congress.

<sup>2</sup> Compare opinion of Atty. Genl., dated Feb. 27, 1901.

*such*, but is merely the personal act of the members who sign it. It should not therefore be incorporated with the record proper, but should be appended to or transmitted with the same as a separate and independent paper. XII, 572, *September, 1866*.

2133. Where the members of a court martial who had joined in a recommendation which had been appended to the record and regularly transmitted to the reviewing authority, applied to have the same withdrawn on the ground that, because of information since received, their opinions had been changed, *advised* that such a proceeding would be exceptional and irregular, and that the preferable course would be to file with the record the application and statement of the members so that the same might be referred to and considered in connection with the recommendation. XXXIII, 580, *December, 1872*.

2134. It is of course always discretionary with a member of a court martial whether he will make or join in a recommendation to clemency. Members however will in general do well to refrain from subscribing recommendations where the testimony on the trial as to the merits of the case or the character of the accused fails clearly to justify a remission or mitigation of the punishment. Weak and ill-considered recommendations have not unfrequently given rise to severe criticism on the part of reviewing officers. Thus in G. C. M. O. 92, Hdqrs. of Army, 1867, the Secretary of War expresses himself as "surprised to find that any officer of the court could recommend remission or commutation of the sentence of dismissal in a case where the conduct of the officer tried was as reprehensible as that of" the accused.<sup>1</sup> Members, in offering recommendations should be careful to state the specific grounds upon which they base the same.<sup>2</sup> XXXIII, 418, *October, 1872*.

2135. Members of a court martial, desiring to recommend an accused to clemency need not all sign the same statement. There may be, in any case, two or more separate recommendations each signed by different members.<sup>3</sup> XXXVII, 121, *November, 1875*.

<sup>1</sup> In G. O. 36 of 1843, the Secretary of War, Hon. J. M. Porter, in reviewing a case, remarks as follows: "The practice of the members of a court martial first finding an officer guilty, and then recommending him for clemency, is to be deprecated. It is an endeavor, too frequently made, to transfer the responsibility of their finding to the Department of War when it should rest upon the court itself." And see G. O. 342, War Dept., 1863, G. C. M. O. 27, of 1871.

<sup>2</sup> In G. O. 70, Dept. of Dakota, 1870, Maj. Gen. Hancock, the reviewing authority, observes: "As the members of the court are silent with regard to the considerations by which they were influenced in making their recommendation in the prisoner's behalf, it is impossible for the reviewing authority to determine whether their reasons for making the recommendation were sufficient to justify a mitigation of the sentence. No consideration can, therefore, be paid to it. The sentence is approved, and will be duly carried into execution."

<sup>3</sup> A case in which there were two recommendations—one signed by a single member—is published and remarked upon in G. C. M. O. 92, War Department, 1875.

## RECORD OF COURT MARTIAL.

2136. It is clearly contemplated by the statute law (see the 113th and 114th Articles of War, taken from the old 90th Article; also the later provision incorporated in Sec. 1199, Rev. Sts.) that a court martial shall make a formal record of its proceedings, and the Army Regulations and Court-Martial Manual direct as to the substance and form of the record in certain particulars. Upon such basis, the record of a court martial has come to be, in our practice, a full report and recital of the details of the trial in each case, including all the testimony introduced. As to the character, effect and proper contents of a record of a military court (the same rules being held to apply in the main to records of garrison and regimental as to those of general courts<sup>1</sup> XXIV, 540, *May, 1867*; XXVII, 647, *May, 1869*; XXXII, 130, *November, 1871*), the Judge-Advocate General has held as follows:

(a) That, in view of the requirement of the Army Regulations that "every court martial shall keep a complete and accurate record of its proceedings," the entire proceedings and action of the court upon the trial should be fully set forth, including the organization, challenges to members (if any), arraignment, pleas, testimony of witnesses and documentary evidence, motions, objections, arguments, rulings of the court on interlocutory questions, adjournments, continuances, closing addresses or statements, findings and sentence;—in short every part and feature of the proceedings, material to a complete history of the trial and to a correct understanding by the reviewing officer both of the merits of the case and of the questions of law arising in the course of the investigation.<sup>2</sup> XXXII, 453, *April, 1872*. Where a sentence is pronounced, the record should contain everything necessary to sustain it in fact and in law. II, 59, *March, 1863*.

(b) That the record of each case tried by a court martial—where several cases are tried thereby—should "be complete in itself" (army regulations, now Court-Mar. Manual [1901], p. 59) and as much an entirety, both in form and in substance, as if it were the only case tried. Each record should be separate and distinct from every other record, containing all that is essential to an original and independent official paper, and so perfected as to leave no material detail to be supplied from any previous or other record. The proceedings in each case should be made up separately: records therefore should not be attached

<sup>1</sup> But A. R. 954 of 1895, as amended by G. O. 39, A. G. O., 1901 (A. R. 1055 of 1901), provides that testimony taken before regimental or garrison court martial will not be reduced to writing.

<sup>2</sup> Compare Colburn v. Wilbur, 7 Pick. 451. See Court-Mar. Manual (1901), pp. 59 and 60.

together, but should be prepared and transmitted as disconnected documents. III, 402, 413, *August, 1863*; XIX, 336, *January, 1866*; XXXII, 130, *November, 1871*.

(c) That the copy of the *convening order*, directed, by army regulations (now Manual, p. 59) to be "set out" in each case, should properly be prefixed to the proceedings, as constituting the initial authority for the existence and action of the court. XXXII, 130, *November, 1871*; XXXIII, 391, *October, 1872*. This order should of course be complete, and should exhibit, by its heading and its subscription, that it has proceeded from a commanding officer competent to order the court. XXIII, 636, *August, 1867*. Where several cases are tried by the same court, a separate copy of the order should accompany the record in each case: only to prefix a single copy to the first of a series of records attached together is irregular and in violation of the regulation as well as the general rule that every record should be "complete in itself." IV, 607, *February, 1864*. Where subsequent orders have been issued, adding or relieving members or a judge-advocate, or otherwise modifying the original convening order, copies of these should follow the original or be elsewhere incorporated in the record. XIII, 384, *February, 1865*. In their absence it may not be possible to determine on the face of the record whether the officers who composed the court on the trial were actually or legally detailed therefor, or whether the prosecuting judge-advocate, or the judge-advocate who authenticates the proceedings, was so detailed. XXI, 488, *June, 1866*; Card 5323, *November, 1898*. In connection, however, with any order making a change in the original detail of members or substituting a new judge-advocate, the record should note the fact of the new member taking his seat, or new judge-advocate commencing to officiate, according to the order, on a certain day. XXIX, 604, *January, 1870*.

(d) That the record should show that the court met and organized pursuant to the order or orders constituting it. It is necessary, *first*, to the due organization of a general court martial that there should assemble at the time and place indicated in the order, at least a quorum, *i. e.* five, of the officers detailed as members. And the record should show that at least five members were present and acting, not only at the original assembling and proceeding to business as well as at the formal organization after the right of challenge has been fully exercised, but also at every day's session throughout the trial to the end. III, 413, *August, 1863*; VI, 384, *September, 1864*. The record of the first assembling should, preferably, specify the members present by name, rank, &c.: the statement that "*all the members*" were present, while strictly sufficient, is not a form to be favored. A state-



ment to the effect that the *same members* were present as at a previous trial by the same court, is improper, as being in contravention of the rule that the record of each case should be an entirety and not made up as to any particular by a reference to a record of a previous case. III, 402, *August 14, 1863*. It is not however irregular to state at the commencement of any day's proceedings—subsequent to the day of the first session of the court in any case—that all the members and the judge-advocate, without specially naming them were present. XX1, 351. *April, 1866*; XXVI, 516, *April, 1868*. The record should also show the presence of the accused at the time of the organization of the court for his trial, as also at all the material stages and portions of the proceedings.<sup>1</sup> XXIV, 488, *April, 1867*.

In the record of the proceedings of a court martial at its organization for the trial of a case the officers detailed as members and judge-advocate should be noted by name as present or absent. In the record of the proceedings of subsequent sessions the following form of words should be used, subject to such modifications as the facts may require: "Present, all the members of the court and the judge-advocate." When the absence of an officer who has not qualified, or who has been relieved or excused as a member, has been accounted for, no further note should be made of it.<sup>2</sup> 46, 395, *April, 1891*. It is not customary to take notice in the record of a mere recess; but if a recess be noted at all, it should appear from the record that, on the reassembling, the members, judge-advocate and accused were duly present. 57, 418, *January, 1894*.

(c) That the record should show that the order or orders convening the court and detailing the members were read to the accused or communicated to him, and that he was afforded an opportunity of objecting to any member, that is to say, that the privilege of challenge, accorded and defined by the 88th Article of War, was extended to him. II, 83, *March, 1863*. This testing of the members is the *second* essential to the due organization of the court, and, though the phraseology of the question put to the accused, or of his answer thereto, need not be given in the record, it should clearly appear either that he had (or made) no objection, or if he made any, what it was. IX, 166, *May, 1864*. Where a specific challenge is offered, it should, preferably, be recorded in the terms in which it is expressed by the accused; and, in connection with each challenge, the record should set forth the remarks of the member, if any, and the action of the court, as also, if an issue be joined on the challenge, the evidence, if any, introduced, and the argument had. Where a member is added to the court at a subsequent stage of

<sup>1</sup> Compare *Long v. State*, 52 Miss., 23.

<sup>2</sup> See Circular 5, A. G. O., 1891; also *Court-Mar. Manual* (1901), p. 137, note 1.

the proceedings, the record should similarly show that the accused was afforded an opportunity of objecting to him, and set forth the action taken if objection was made. VIII, 662, *July, 1864*. It may be added that while, with the convening order, any subsequent orders by which the original detail may have been modified, should be read to the accused,—the fact that other orders relating to the court, but not to its *personnel*, such as an order changing the place of meeting or an order authorizing the court to sit without regard to hours, may not have been so read, will not constitute an irregularity. It is usual, however, and proper, to read all such orders, equally with those relating to the composition of the court, in the presence of the accused. XXXIX, 239, *October, 1877*.

(f) That the record should show, as the final essential to the due organization of the court, that the members and judge-advocate were qualified by being duly *sworn*. And this should be shown in the record of every case tried by the same court, since the court and judge-advocate must be sworn independently and anew for each trial.<sup>1</sup> XXXV, 3, *April, 1873*. The approved form for recording this proceeding is: "The members of the court and the judge-advocate were then duly sworn." Any statement, however, will be legally sufficient from which it can be gathered by the reviewing officer, or presumed, that the members and judge-advocate were in fact qualified as required by Arts. 84 and 85. Where an absent member joins or a new member is added to the court, or the first judge-advocate is relieved and a new judge-advocate is detailed, at a stage of the proceedings subsequent to the original organization and qualifying, the record should show that such member or judge-advocate, before acting, was sworn as above indicated.<sup>2</sup> III, 548, *August, 1863*; IX, 222, *June, 1864*; Card 5323, *November, 1898*.

(g) That the record should further set forth the *arraignment* of the accused on the charges and specifications, with the plea or pleas made. If special pleas are interposed, the issue joined and action taken upon the same should be clearly stated. II, 83, *March, 1863*; XV, 546, *July, 1865*; Cards 5166, 5187, *October, 1898*. The charges and specifications should properly be embodied *in* the record instead of being referred to as annexed. XIV, 39, *January, 1865*.

(h) That the record should fully set forth all the *testimony* introduced

<sup>1</sup> Compare *Coffin v. Willbourn*, 7 Pick. 150. "It is not considered a compliance with" par. 829, Army Regulations, directing that "the court is to be sworn at the commencement of each trial," "to call several prisoners into court at the same time and swear the members of the court *separately* before them all." G. O. 60, War Dept., 1873. See also Court-Mar. Manual, pp. 59 and 139.

<sup>2</sup> The inversion of the proper *order* of swearing the court and judge-advocate was held by the Attorney General (13 Opins. 374) not to have invalidated the proceedings of a naval court martial.

upon the trial—the oral portion as nearly as practicable in the precise words of the witness. II, 23, *February, 1863*. For a judge-advocate to assume to record only such testimony as he considered material, or to summarize the testimony given, has been remarked upon as a gross irregularity. III, 189, *July, 1863*; XX, 42, *October, 1865*.

It is usual and proper (though not essential) to specify by which party the witness is introduced and by whom the questions are put. XXXIV, 435, *September, 1873*. It is also usual (though not essential) to designate the point at which the prosecution is closed and the testimony for the defence is commenced. IV, 131, *September, 1863*. It should appear that each witness (whether or not his evidence was important) was duly sworn (III, 550, *August, 1863*; XXI, 43, *November, 1865*; XXXIV, 457, *September, 1873*), but it is not customary to add that he was sworn in the presence of the accused; this fact that he was so sworn being presumed in the absence of any statement to the contrary.<sup>1</sup> IX, 166, *May, 1864*. Objections taken to the admissibility of testimony should be set forth with the argument had thereon, if any, and the ruling of the court (XXVI, 643, *July, 1868*); and where the court is closed on any interlocutory objection, the fact will properly be noted. IX, 221, *June, 1864*.

When the court closes, the record should (now) properly set forth that the judge advocate *withdrew*. (Act of July 27, 1892, s. 2.) But an absence of a statement to this effect will not impair the legal validity of the record. Where it simply appears from the record that the court "closed," the presumption will be that, in closing, the requirements of law were observed.<sup>2</sup> 56, 387, *November, 1892*; 65, 350, 356, *June, 1894*; Card, 114, *August, 1894*.

The record need not show affirmatively that the accused was offered an opportunity to cross-examine. Where it appears that he did *not* cross-examine, the presumption will be that he waived the privilege. So, the record need not state that the accused was notified of his privilege of being assisted by counsel. So, it need not specifically state or show that the court adjourned at or before 3 o'clock p. m.<sup>3</sup> In the absence of evidence to the contrary, it will be presumed to have done so. There is always a presumption, in the absence of obvious irregularity, that the proceedings were regular and according to law. 44, 456, *January, 1891*.

(c) That the record should set forth the *finding* on each of the several charges and specifications (IX, 221, *June, 1864*; Cards 5166 and 5187,

<sup>1</sup> There is, however, no statutory requirement that a witness should be sworn in the presence of the accused.

<sup>2</sup> See Circs. 12 and 13, A. G. O., 1892.

<sup>3</sup> See note to 94th Article of War, p. 85, *ante*.

*October, 1898*), the proper entry as to previous convictions<sup>1</sup> (Card 3007, *April, 1897*), and the sentence in the event of a conviction. In a case of a death sentence the record should state that it was concurred in by two-thirds of the members.<sup>2</sup> I, 487, *December, 1862*; II, 21, *February, 1863*; IV, 158, *September, 1863*. Care should be taken that there be no variance in the statement of the name, &c., of the accused, between the finding or sentence and the charges. As directed by army regulations, the record should be "authenticated" by the signatures of the president and judge-advocate. II, 545, *June, 1863*. Where, indeed, there are no material proceedings after the sentence, the subscription of the latter by these officers will constitute a sufficient authentication of the record as a whole. XIX, 616, *May, 1866*. Where the president or judge-advocate has been changed pending the trial, it is of course the last one, the one who was serving at the close of the trial, who should sign the record. XXIX, 604, *January, 1875*; Card 5332, *November, 1898*. Adjournments from day to day are not required to be authenticated. VIII, 507, *June, 1864*. A judge-advocate appointed *after* the conclusion of a trial would not be competent to authenticate the record of such trial. If authentication by the officer who was judge-advocate at its close cannot be obtained, the proceedings should be disapproved.<sup>3</sup> Card 5230, *October, 1898*.

(*k*) That, as in substance directed by par. 896, A. R. (955 of 1895; 1057 of 1901), the record should exhibit, at the end of the proceedings of the court, the action thereon—approval or disapproval, &c.—of the reviewing authority. II, 550, *June, 1863*. This, though it has sometimes been endorsed on the outside of the record, is preferably and customarily written and signed within the record on a page following the authenticated judgment or other final proceeding of the court. IV, 428, *December, 1863*. Where several cases are tried by the same court, the action of the reviewing officer should be entered in the record of each trial; merely to endorse it upon the last of a series of cases would be irregular as not a compliance with the regulation. XIX, 336, *January, 1866*. So it is irregular for the reviewing officer, in lieu of writing and subscribing his action in the record, to annex to it or file with it a copy of a general order promulgating the proceed-

<sup>1</sup> See PREVIOUS CONVICTIONS, *ante*; also Court-Mar. Manual (1901), p. 515.

<sup>2</sup> See Court-Mar. Manual (1901), p. 58, par. 1.

<sup>3</sup> Par. 954, A. R. of 1895, as amended (1055 of 1901), now provides:—"Every court martial shall keep a complete and accurate record of its proceedings, which will be authenticated in each case by the signatures of the president and judge-advocate. Whenever, by reason of the death or disability of the judge-advocate occurring after the court has decided on the sentence, the record can not be authenticated by his signature it must show that it has been formally approved by the court and must be authenticated by the signature of the president. The judge-advocate should affix his signature to each day's proceedings. Testimony taken before regimental or garrison courts martial will not be reduced to writing."



ings and his action thereon. I, 412, *November, 1862*. Where the proceedings are to be forwarded to higher authority for final action on the sentence, a mere reference, as by the words—"respectfully referred, or forwarded, to the President" (or other superior) "for action," &c., is incomplete and irregular. In such a case the original reviewing officer should state his approval, &c., in full and formal terms. IV, 337, *November, 1863*; VII, 132, *February, 1864*; Card 2844, *January, 1897*.

(7) That where the court is reassembled for the purpose of a *revision* of its proceedings in any particular, the record should formally recite all that is ordered and done as a new and independent chapter of the history of the case tried. The record of a revision will properly begin with setting forth a copy of the order re-convening the court, and will show that at least five members assembled, together with the judge-advocate, and, where the correction required is such as to make it proper that he be present (see § 2252, *post*), the accused. The record will further show the action taken by the court, in making the correction or otherwise, under the order, and the proceeding will be finally authenticated by the signatures of the president and judge-advocate. I, 487, *December, 1862*; II, 97, *March, 1863*; IX, 653, *September, 1864*; XI, 93, 113, *November, 1864*; XV, 547, *August, 1865*; XVII, 402, and XIX, 135, *October, 1865*. Where the court decides upon making the correction, the same should be *declared to be made* in manner and form as determined upon and with the proper reference to the part of the original proceedings in which the error occurs. The error itself, however, is to be left as originally recorded; all corrections in the body of the record by erasure, interlineation, &c., being irregular and improper. XI, 93, *supra*; XVI, 202, *May, 1865*; 23, 345, *April, 1888*.

(iii) It is the better practice that all the proceedings—even those that are irregular—which transpire in connection with a trial or at a revision should be set out in the record for the information of the reviewing authority. XXVI, 251, *December, 1867*. It is however not necessary to encumber a record by spreading upon it documents, or other writing or matter, excluded by the court. But the character of the writing and the grounds upon which it was ruled out should be specified. XIX, 614, *December, 1885*.

2137. Among the minor points held by the Judge-Advocate General, in connection with the subject of the form of the record, are the following: That the several stages of the proceedings of the court should appear in the record in the proper order; thus, that the swearing of the court should not be recorded before the statement as to whether the accused objected to any of the members, &c. XI, 1,

*October, 1864.* That, in its statement of the opening of each day's session, the record may well mention, if such was the fact, that the proceedings of the previous day or session (if any were had in the *same* case) were read and approved. XXV, 349, *February, 1868*; XXXIV, 167, *March, 1873.* Such a reading however, though desirable as giving the court an opportunity to make corrections, is often not resorted to, and even where it is, is not always noted in the record.<sup>1</sup> XXI, 679, *November, 1866.* That there is no legal objection to *printing* the record, or any part of it (such as the orders, charges and specifications, where numerous), provided of course the signatures of the president and judge-advocate are written by them in person. XIII, 384, *February, 1865.* That the record will conveniently and properly be endorsed on the outside, or cover, so that the name of the accused, and the court by which he was tried, with the time and place of trial, &c., will be apparent without opening and examining the proceedings. XXXI, 244, *March, 1871.*

2138. Unless it clearly appears to the contrary on the face of the record, it is in general to be *presumed* therefrom, not only that the court had jurisdiction in the case, but also that the proceedings were sufficiently regular to be valid in law.<sup>2</sup> XII, 353, *February, 1865.*

2139. Where the proceedings of a court martial have regularly terminated, and the sentence has been confirmed and ordered to be executed by the proper and final reviewing authority, the fact that the record has since been *lost* does not impair or affect the judgment of the court, and constitutes no legal obstacle to the enforcement of the penalty. IX, 238, *June, 1864.* But where the record of the trial of a soldier who had pleaded not guilty, and in whose case considerable evidence had been introduced, was, by a casualty of war, lost before any action had been taken upon the sentence by the reviewing officer,

<sup>1</sup> See Court-Mar. Manual, (1901), p. 60, par. 2.

<sup>2</sup> However desirable it may have been, in view of the numerous and serious defects frequently occurring in the records of courts martial during the war of the Rebellion, and in order to induce a greater precision and uniformity in the preparation of such records, to treat (as was not unfrequently done) the mere *grave* of these defects as *fatal to the validity* of the proceedings or sentence, it is conceived that the same, in general, might properly have been regarded, and may now be regarded, as only calling for, or justifying, a *disapproval* of the proceedings. It is the effect of the ruling of the civil courts that where the court on any trial was legally constituted, had jurisdiction of the case, and has imposed a legal sentence or judgment, every reasonable intendment will be made in favor of the regularity of its proceedings, and even where the same are clearly irregular, the validity of the result will not be deemed to be affected, provided no statutory provision has been violated. See *Hutton v. Blaine*, 2 Sergt. & Rawle, 75, 79; *Moore v. Houston*, 3 *id.* 197; *Trinity Church v. Higgins*, 4 Robt. 1; *Edwards v. State*, 47 Miss 581. And it is further held that the regularity or validity of the minor details of the proceedings may be shown by evidence outside the record. *Van Dusen v. Sweet*, 51 N York, 373. Similarly—it is believed—no omission or error in a record of court martial, not in contravention of express statute, should, as a general rule, be regarded as absolutely invalidating

*held* that, unless the court could be reconvened and a new record could be made out from extant original notes, the proceedings, inasmuch as they could not be intelligently reviewed or formally approved, should properly be considered as inoperative and the sentence of no effect. VI, 582, *December, 1864*.

Where the record of the trial of a deserter was destroyed by fire before it could be acted upon, and he was thereupon restored to duty, *held*, that the destruction of the record before action thereon had in the particular case, the legal effect of an acquittal and relieved the deserter from the forfeiture of pay due at date of desertion. 55, 181, *August, 1892*; 65, 338, *June, 1894*.

2140. The legal record of a court martial is that record which is finally approved and adopted by the court as a body, and authenticated by its president and judge-advocate. The court as a whole is responsible for the record; and the instrument which it approves as such is its record, however the same may have been made up. It is immaterial to the sufficiency of a record whether the same was kept or written by the judge-advocate or a clerk. So where a clerk or reporter, appointed and sworn to keep the record, did not act, but the record was prepared by the judge-advocate or some other person employed by him to assist him, *held* that this circumstance did not affect the validity of the record as finally approved by the court. XLIII, 346, *June, 1880*.

2141. The record of a trial by court martial should include a record of meetings where no business is transacted, together with a statement of the reason why none was transacted. XLVIII, 209, *January, 1884*.

2142. It is not essential that the record of the court should show that the judge-advocate called the attention of the accused to the fact of his privilege of testifying in his own behalf. G. O. 75 of 1887

the proceedings where there remains enough in the record fairly to warrant the presumption that the legal requirements have been complied with, or where the reviewing authority can supply the defect from his own official knowledge, or from current orders or other satisfactory evidence readily available to him. Thus where no copy of the convening order accompanies the proceedings, but the reviewing authority, from the fact of having issued it himself or from the records of the command or otherwise, is officially apprised that the court was duly convened, the proceedings are not to be treated as fatally defective, but the court appearing in fact to have been constituted and to have acted pursuant to the order,—may be regarded as valid in law though imperfectly recorded. Where indeed the record discloses in the proceedings of a general court martial, an irremediable defect in a vital particular, as the fact that the court was composed of but four members, the proceedings and sentence, if any, must be held inoperative, since the *statute law*—Art. 75—has fixed five members as the legal *minimum* for such a court. But where the defect occurs in a less material feature, or some of form only, the same, while it may, if of a grave character, properly warrant a *disapproval* of the proceedings—in case it can not be removed by a revision by the court on being reassembled for the purpose,—will not in general, it is held, justify the reviewing authority in pronouncing the proceedings to be void, or in treating them as necessarily without legal effect.

requires only that this be done "before the assembling of the court." 36, 185, *October, 1889*.

2143. The record of a court martial must show affirmatively whatever is made by *statute*, essential to its jurisdiction and the legality of its proceedings,<sup>1</sup> for example, that the members and judge-advocate were sworn as enjoined by the 84th and 85th Articles of War. So repeatedly *held* that if the record failed to show that the court and judge-advocate were sworn, and the omission could not be supplied by proceedings on revision, the sentence was void; but that if the court had not been dissolved, the original reviewing authority, or his successor in command, the record having been transmitted to him, either before or *after* his final action on the sentence, could legally reconvene the court to supply the omission in the record, if there was in fact an omission; the only purpose of such revision being to make the record conform to the actual facts, in other words to speak the truth. I, 487, *December, 1862*; II, 154, 155, *April, 1863*; IX, 653, *September, 1864*; XI, 93, *November, 1864*; XIX, 336, *January, 1866*.

2144. A mere clerical error in the spelling of the name of the accused, leaving it *idem sonans*, is not a case of misnomer and does not affect the validity of the proceedings as recorded. 25, 234, *June, 1888*.

2145. The record of a court of justice consists of two parts which may be denominated the substantive and the judicial portions. In the former the substantive portion the court records (makes a record of) or attests its own *proceedings* and *acts*. To this (record or attestation) unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects nor the facts thus recorded or attested, to be proved in any other way than by the production of the record itself or by copies proved to be true in the prescribed manner.<sup>2</sup> The Supreme Court of the United States has repeatedly held that a court martial is a court possessing ample and exclusive jurisdiction to try and determine a certain class of cases, and that its functions are those of a court and its acts judicial proceedings, etc.<sup>3</sup> These proceedings and acts are all recorded, and the record thus made is ultimately filed in its proper place as the record of the judicial proceedings had. Where therefore, after a record of a general court martial had been duly acted upon and the sentence (dismissal of an officer) executed, the dismissed officer filed affidavits to the effect that the testimony of one witness had not been made a part of the record (which in fact did not show that any such witness testified) and asked that the sentence be set

<sup>1</sup> *Hunkle v. U. S.*, 122, U. S., 543.

<sup>2</sup> *Best, Principles of Evidence*, p. 578.

<sup>3</sup> See *Dynes v. Hoover*, 29 Howard, 65. *Ex parte Reed*, 100 U. S., 15; *Smith v. Whitney*, 116 *id.*, 167; *Johnson v. Sayre*, 158 *id.*, 100; *Swain v. U. S.*, 185 *id.*, 561.



aside as void, it was held that the record could not be thus contradicted or impeached, or the validity of the sentence questioned.<sup>1</sup> Card 5654, May, 1899.

2146. It is required by army regulations, that reviewing officers shall state at the end of the proceedings in each case their decision and orders thereon, but there is no law requiring this of the President. His approval of the sentence of dismissal by court martial must be his personal act but the law does not prescribe the manner in which he shall communicate such action, and in the absence of such a provision, it would seem that he may legally communicate his action with reference to court martial cases by means of the ordinary court martial order. Thus where the record of a trial, involving dismissal of an officer, contained no entry of the action of the President, *held* that the order publishing the case and setting forth the action thereon of the President was sufficient and legal evidence of such action.<sup>2</sup> 22, 436, February, 1888.

## RECORD OF SERVICE.

2147. No official of the War Department, or other executive officer, is empowered to change a record of *fact*—to so alter the official record of a soldier that it shall state that as a fact which is not a fact, whatever may be the equities of the case. It can not, for example, be made to appear on such a record that the soldier has been discharged, mustered out, reenlisted, or mustered in, when in fact he has not been. Congress alone can grant relief in such cases by authorizing such entries of record as would in effect accomplish the object sought—as it has indeed done in repeated instances. 35, 357, 393, and 36, 175, October, 1889; 40, 225, April, 1890; Card 8962, September, 1900. The general rule is that only erroneous records shall be amended, and the object of their amendment should be to make them state the truth (by correction by the person who made them or such entry thereon by

<sup>1</sup> See the opinion of the Attorney General in this case, published in G. O. 21, A. G. O., 1900, the latter portion of which referring to the record of the court martial, reads as follows:

"The record is that which the court certify to have transpired on the trial, and embodies the action of the court. The fact that the court in due and legal form announces that it did so and so, or that so and so transpired, makes that the record and the fact, and no one except the court itself can lawfully alter that record. If it were to be held otherwise, there is not a record filed in the War office that could not be subject to attack by *ex parte* affidavits and that too at a time when the officers of the court might be dead or scattered to the ends of the earth and unable to defend the solemn certificate which they made; and all the judgments of courts martial as filed and acted on would be open to perpetual contradiction on subsequent assertions of interested parties which it would be impossible to meet or disprove."

<sup>2</sup> See 2 Opins. At. Gen., 69; 7 *et* 472; Williams v. U. S., 17 Peters, 152, in connection with Runkle v. U. S., 122 U. S., 543.

another as may be duly authorized).<sup>1</sup> The exception to the general rule is where a *statute* requires a certain amendment to be made. But in such an instance the statute should be strictly observed and applied only to the class of cases falling within its purview. 56, 352, *November, 1892*.

#### REDUCTION TO THE RANKS—OF COMMISSIONED OFFICER.

2148. Reduction to the ranks was authorized to be imposed as a punishment by courts martial upon commissioned officers of the army, on conviction of absence-without-leave—by the act of March 3, 1863, c. 75, s. 22; and, upon conviction of the offence of neglecting or refusing to turn over to the proper official any captured or abandoned property coming into the possession of the party—by the act of March 12, 1863, c. 120, s. 6. This punishment which involved a dismissal of the officer (XVI, 484, *August, 1865*) is no longer legal; the statutory provisions indicated being impliedly confined in their application to the period of the civil war (or for a limited period succeeding the same), and not being re-enacted in the Revised Statutes.<sup>2</sup>

#### REDUCTION TO THE RANKS—OF NON-COMMISSIONED OFFICER.

2149. A court martial, in sentencing a non-commissioned officer to be reduced to the ranks, is not empowered to direct that when reduced he be transferred to another regiment or company.<sup>3</sup> XI, 205, *December, 1864*.

2150. The warrant or certificate given to a non-commissioned officer is as much the personal property of the individual as is the commission given to a commissioned officer. In the absence of any statute or regulation requiring that a sergeant or corporal shall surrender his warrant on being reduced to the ranks (or dishonorably discharged), he may retain it with the same right as that by which an officer retains his formal commission on being dismissed. XII, 310, *July, 1878*.

2151. A sergeant deserted and upon the recommendation of the company commander his successor was appointed by the regimental com-

<sup>1</sup> See § 2452, *post*, and note.

<sup>2</sup> Cases of officers sentenced to this punishment, upon conviction under the first named statute, are published in G. O. 27, War Dept., 1864, do. 80, Dept. of the East, 1863, do. 38, Dept. of the East, 1864; do. 39, Middle Dept., 1864; do. 5, 2d Div., 5th Army Corps, 1864; G. C. M. O. 25, 51, Army of Potomac, 1864; do. 12 of 1865. No instance has been met with of the imposition of this punishment upon a conviction under the latter statute. In some few cases, during the civil war, this punishment was adjudged—illegally—for offences other than those specified in the acts designated in the text.

<sup>3</sup> The authority to order the transfer of soldiers is expressly vested by the Army Regulations in certain military commanders.

mander. *Held*, that the legal effect of such appointment was to reduce the deserter to the grade of a private. Card 2213, *May, 1896*.

2152. The legal effect of an order making an appointment or promotion of a non-commissioned officer to a position supposed to be vacated by an illegal sentence, when made by the officer having authority to reduce by order, would be a reduction by order of the soldier so sentenced to reduction. Card 2757, *November, 1896*.

## RE-ENLISTMENT.

2153. Except in cases to which the last paragraph of the 60th Article of War may be applicable, a soldier cannot be made amenable for an offence committed under an enlistment prior to that in which he is serving. Re-enlistment does not revive such a liability. L, 501, *July, 1886*.

2154. The term re-enlistment is sometimes used in the narrow sense of an enlistment within one month after discharge under sections 1282 and 1284, Rev. Sts.; but these sections simply prescribe increased pay in case of re-enlistment within one month.<sup>1</sup> They do not prevent a re-enlistment after the expiration of the month. Section 1116, Rev. Sts. is based upon the law of March 16, 1802 (2 Stats. 135), in which there is no such limitation as to time. Re-enlistment under this statute means a re-entry into the service and it is prescribed that as to such re-entry the limitation as to age shall not apply. LVII, 41, *October, 1888*.

2155. The act of June 20, 1890, c. 437, in directing the mustering out of the enlisted men of the Artillery Detachment at West Point and their immediate re-enlistment as army service men in the Quartermaster Department, does not authorize their being forced into a new contract or re-enlisted against their will. The enlistment, like all other enlistments, can be voluntary only. 41, 460, *July, 1890*.

2156. *Held* that the provision of the Army Appropriation Act of Feb. 27, 1893, c. 168, that thereafter, in time of peace, "no private shall be re-enlisted who has served ten years or more," applied to "lance corporals" and "band musicians," but did not apply to general service clerks, or to the musicians of the band of the Military Academy. 58, 338, *March, 1893*.

2157. Under the act of Feb. 27, 1893, c. 168, a soldier who has served as an enlisted man twenty years or more may be re-enlisted, but if G. O. 96 of 1891 be observed, only in his former command. 61, 57, *August, 1893*. The term "as enlisted men" here employed, *held*, in

<sup>1</sup> The act of Aug. 1, 1894, c. 176, extends this period to three months.

view of the context, to mean enlisted men of the army. A service of twenty years, a portion of which was rendered in the navy, *held not to authorize a re-enlistment.*<sup>1</sup> 62, 91, *October, 1893*; 65, 257, *June, 1894*.

**2158.** Desertion during a term of enlistment rendered service during such term *not* honest and faithful within the meaning of the act of June 16, 1890, and for the purposes of that act only. *Held*, therefore, that the question whether desertion constitutes a bar to re-enlistment under the act of Aug. 1, 1894, is a matter to be determined by the Secretary of War. Cards 2004, 2121, *January and March, 1896*; 3530, *September, 1897*; 3794, *June, 1898*.

**2159.** *Held* that the term of three months after honorable discharge within which a man may be re-enlisted under the act of August 1, 1894, commences on the day after the day of the discharge. It is a uniform principle in the construction of statutes—which do not expressly describe a different rule—that where time is to be computed from an act done, the day on which the act is done *shall be excluded.*<sup>1</sup> Card 1084, *March, 1895*.

#### REGULAR ARMY.

**2160.** The regular army was mainly distinguished from the *other* principal contingent of the army of the United States during the civil war—the volunteer force—by the fact that the tenure of office of the officers of the former was not in general limited, either expressly or by implication, to the period of the war. An unlimited tenure, however, is not a necessary or invariable incident of office in the regular army. The eleven new regiments, for example, added to the regular army by the act of July 29, 1861, were “declared to be for service during the existing insurrection,” &c.<sup>2</sup> XXXIV, 459, *September, 1873*.

**2161.** The term regular army and “volunteer army” are not significant of the methods by which these two branches of the army are brought into the service. The term “regular army” simply means the “standing army” the military organization of the Government, which it is the intention ordinarily to maintain and continue in existence indefinitely and without regard to whether the country is at peace or at war; and this army is made up of persons who engage voluntarily and directly with the United States to serve. Card 1301, *March, 1895*.

<sup>1</sup> This conclusion was sustained by a subsequent opinion of the Attorney General of Nov. 23, 1893.

<sup>2</sup> But the provision here referred to and that referred to in the preceding section of the act of Feb. 27, 1893, were repealed by the act of Aug. 1, 1894, “to regulate enlistments in the Army.”

<sup>3</sup> See 9 Opins. At Gen., 131.

<sup>4</sup> And see EXTRA PAY, as to the similar tenure of medical storekeepers of the army, also AID DE CAMP, as to the tenure of “additional” aids de camp.



## RELIEF.

**2162.** An officer or soldier cannot in general properly be relieved by executive authority from the consequences of a military order or proceeding unless the same has deprived him of some *specific right* capable of being legally restored by the same authority—as a right to pay, allowances, or bounty, or a right of command, precedence, &c. Action not looking to some recognized form of specific relief must in general be superfluous and futile, and to take such action is contrary to the usage of the War Department. Thus where, in the case of a party who, in 1864, had been dismissed the service as an officer of the army by the sentence of a court martial duly confirmed and executed, an application, supported by evidence going to indicate that his dismissal may not have been strictly legal, but not satisfactorily establishing the fact of illegality, was presented in his behalf, asking to have the stigma attaching to his record in the service by reason of the dismissal removed by an official declaration in general orders,—*advised*, that such form of relief, especially in view of the fact that the party had *deceased*, would not be within the proper province of the Secretary of War. XLI, 214, *April, 1878*.

**2163.** An executive department has in general *no power* either to *undo an executed legal act of the past* or to indemnify a party for injury suffered by him therefrom. Thus where an officer claimed that he had been unjustly prejudiced by not having had a higher relative rank in his grade given him by his original appointment, but it appeared that said appointment had been confirmed by the Senate, accepted, and held for nearly thirteen years, and that to increase as desired the relative rank thereby conferred would divest the rights of twelve officers who now ranked the claimant in his grade, *advised*, that however unjustly his appointment, when made, may have discriminated against this officer, his case was one in which Congress alone could grant the appropriate relief.<sup>1</sup> XLIII, 206, *February, 1880*.

## REMISSION.

**2164.** Remission is relieving the person from a *punishment* or the unexecuted portion of a punishment, but not pardoning the *offence* as

<sup>1</sup> The authority of the executive department of the Government to grant relief is limited by strict law and to a few subjects. *Congress, in our system, is the fountain of general relief.* By its authority to authorize special appointments, and to dispose of the public money, it can meet and adequately provide for nearly all the applications for relief presented by officers and soldiers of the army which the Executive is not empowered favorably to act upon.

As to relief by means of the Pardoning Power, see § 1860-1883, *ante*. As to relief from a dismissal, or from a sentence of court martial, see §§ 1199, 1200, 1214, 2042, *ante*, and §§ 2367-2373, *post*.

such, or removing the disabilities or penal consequences attaching thereto or to the conviction.<sup>1</sup> The pardoning of "punishment," authority for which is vested in certain commanders by the 112th Article of War, is remission. An offender can be completely rehabilitated only by a *full pardon* granted under the pardoning power of the Constitution.<sup>2</sup> XXIV, 679, *July, 1867*; XXXVII, 613, *June, 1876*; LVII, 89, *October, 1888*; 32, 401, *May, 1889*.

2165. Where a soldier, prior to his entering upon a term of imprisonment under sentence, has been held confined in the guard house, it has been a practice of the War Department to credit him with so many days on his term as he was so confined in excess of thirty days. This is a form of remission of so many days of the term imposed by his sentence. 57, 371, *January, 1893*; 62, 368, *November, 1895*.

2166. After a sentence is once unconditionally remitted, it cannot be renewed or revived. An order purporting to revoke the order promulgating the remission, would be void and of no effect. Card 2170, *April, 1896*.

#### REMOVAL OF DISABILITY.

2167. The so-called "removal of disability," sometimes ordered by the President during the war of the rebellion, was a form adopted in cases of officers of volunteers who had been dismissed the service, and whom, for good cause shown, it was thought proper to reinstate. This form was not an exercise of the pardoning power, nor did it, properly speaking, discharge the party from any disability, since a dismissed officer is under no legal disability to re-enter the army. It simply amounted to a waiver of objection on the part of the Executive to the reappointment of the officer by the governor of his State, or rather an official declaration that, if reappointed, he would be received and allowed to be mustered into the service of the United States, notwithstanding his previous dismissal. Its effect was to remove the stigma of the dismissal, and, if a reappointment followed, to fully rehabilitate the party. This form had of course no proper application to officers of the *regular* army, and the term "removal of disability" has no longer any significance in our service as applied to cases of dismissal. V, 446, *December, 1863*; XXIX, 431, *November, 1869*; XXXVI, 330, *March, 1875*; XLI, 675, *September, 1879*.

<sup>1</sup> Compare *Perkins v. Stevens*, 24 Pick. 277; *Lee v. Murphy*, 22 Grat. 799; 1 Bish. Cr. L. § 763; 2 Opins. At Gen. 329; 7 id. 588; 8 id. 283-4.

<sup>2</sup> *Ex parte Garland*, 4 Wallace, 380.

## REPORTER.

**2168.** The power to appoint the reporter, under Section 1203, Rev. Sts.,<sup>1</sup> is vested exclusively in the judge-advocate and cannot be exercised by the court. The employment, however, of a stenographic reporter should be resorted to only in an important case.<sup>2</sup> 11, 515, *June, 1863*; XXXIV, 232, *April, 1873*.

**2169.** The statute does not indicate by whom the reporter shall be sworn. In practice he is sworn by the judge-advocate; a form of oath being prescribed in the Manual for Courts Martial. If the same party is employed as a reporter for more than one case, he should, properly, be sworn anew in each case.<sup>3</sup> Cards 294, *September, 1894*; 4646, 4647, *July, 1898*; 5169, *October, 1898*.

**2170.** Par. 959 A. R., provides that when a reporter is employed under section 1203, Rev. Sts., he will be paid not to exceed ten dollars per day, but that "in special cases when authorized by the Secretary of War, stenographic reporters may be employed at rates not exceeding 25 cents per folio (one hundred words) for taking and subscribing the notes in shorthand, and ten cents per folio for other notes, exhibits and appendices." *Held* that this regulation requires the action of the Secretary of War in each special case, and does not contemplate a delegation of his authority in the matter. Card 5564, *December, 1898*.

**2171.** Paragraph 959, Army Regulations, as amended (see 1063 of 1901), authorizes payment of mileage over the shortest usually travelled route at the rate of eight cents per mile, to a reporter of a court martial and his assistants while going from the place of employment to the place of holding the court, provided the latter place is more than ten miles from the former. *Held*, that the regulation does not authorize payment of mileage for the return journey. Card 7101, *September, 1899*.

**2172.** By circular 22, A. G. O. of 1898, the employment of enlisted men as reporters for courts martial was authorized "without extra expense to the United States." Under A. R. 960 (1064 of 1901), "no person in the military or civil service can lawfully receive extra compensation for clerical duties performed for a military court" and see.

<sup>1</sup> This section provides: "The judge-advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court, and may set down the same, in the first instance, in short hand. The reporter shall, before entering upon his duty, be sworn, or affirmed, faithfully to perform the same."

<sup>2</sup> See pars. 958 and 959, A. R. (1062 and 1063 of 1901).

<sup>3</sup> See Circ. 11, A. G. O. 1894; also note 5, p. 29, Court-Martial Manual (1901).

That the reporter should be excluded from the court during its deliberations and not permitted to record the findings or sentence, see § 798, *ante*.

6 of the act of April 26, 1898 (30 Stats. 365), provides "that in war time no additional increased compensation [*i. e.* additional to the twenty per centum increase] shall be allowed to soldiers performing what is known as extra or special duty." *Held* that under the regulation and statute referred to no extra pay can be allowed an enlisted man for services as reporter. Cards 5434, *December, 1898*; 7334, *November, 1899*.

2173. The army appropriation acts now appropriate money "for expenses of courts martial, courts of inquiry, and compensation of reporters and witnesses attending the same." Reporters for courts of inquiry may therefore be paid out of such appropriation. If the employment of a reporter for a board of officers should be authorized by the Secretary of War, payment for such service would have to be made from the appropriation for the contingent expenses of the army. Card 6971, *September, 1899*.

#### REPRIMAND.

2174. A court martial, in imposing the punishment of *reprimand*, will, if adding anything in regard to its execution, properly direct that the reprimand be administered by the commander who convened the court. A sentence to be reprimanded by an officer inferior to the convening authority is not in accordance with the approved practice of the service. It is not necessary or desirable, however, that the court should direct as to the execution of the sentence, the same being the proper province of the reviewing officer. XII, 18, *October, 1864*.

2175. Although, in adjudging a reprimand, it is generally intended by a court martial to impose a mild punishment, the quality of the reprimand is nevertheless left to the discretion of the authority who is to pronounce it, and it is open to him to make it as *severe* as he may deem expedient without being chargeable with adding to the punishment. XXXIII, 498, *November, 1872*.

#### REQUISITION.

2176. Whether the Executive shall turn over a military prisoner undergoing sentence of court martial to a governor of a State, upon his formal request, in order that he may be tried and punished by a court of the State, or in order to enable such governor to surrender him to the governor of another State in compliance with a requisition made by the latter for the party as a criminal under the laws of the latter State, is a question to be decided by considerations of policy and expediency suggested by the facts of the particular case. The



U. S. Government is under no obligation to surrender its prisoner, and whether it will, in comity, do so, should in general depend mainly upon the nature of the crime charged. Unless the party be charged with a peculiarly heinous offence, of which, for the purposes of public example and punishment, a prompt investigation by a civil tribunal is called for, the Executive will in general properly decline to turn over the party to the civil authorities till his military punishment has been fully executed. XXXVII, 47, *October, 1875.*

## RESIDENCE

2177. The fact that an officer is stationed within a particular State or Territory does not make the same his legal residence, since he is there, not by his own will or choice, but in obedience to the order of a superior, and moreover can have no *animus manendi*, subject as he is to be removed at any moment by a similar order to a station in a different State or Territory.<sup>1</sup> Exceptions, however, to this general rule may exist in the cases of officers who are not subject, or likely, to have their places of habitation changed by superior military authority. Such are the cases of the officers—the chiefs of the staff corps for instance—whose duties require them to remain or at least have their offices permanently in Washington; and such are also the cases of the majority of the officers on the retired list. In any such exceptional case, the question of residence, where it is at all doubtful, will in the main, as in the cases of civilians, be determined by the evidence of an *animus morandi*, as exhibited by the acts and declarations of the party. XXIX, 85, *July 1869*; XXX, 215, 528, *March and July, 1870.*

2178. An officer who has resided elsewhere cannot make a certain place his residence by merely declaring that it is so, or that he has elected it to be such. He must take some definite action indicating an intention and an ability to permanently remain, such as providing himself with a dwelling there, removing his family there, entering into business there, etc., to constitute the place designated his actual residence or domicile in law. 53, 443, *May, 1892.*

2179. If a legal residence in a certain State has once existed, mere temporary absence, however long continued, as the result of an enlistment or enlistments in the army, will not destroy it.<sup>2</sup> L. 392, *June, 1886.* Liability to taxation or other liability, as a *resident* of a certain locality, is not ordinarily affected by the enlisting or holding of a com-

<sup>1</sup> *Graham v. Commonwealth*, 51 Pa. St. 258; *Wood v. Fitzgerald & Wingate*, 3 Oregon, 508; G. O. 13, First Mil. Dist., 1868; *Taylor v. Reading*, 4 Brewst. 439; *Dexlin v. Anderson*, 38 Cal. 92. And see § 645, *ante*.

<sup>2</sup> *Brewer v. Linnaeus*, 36 Maine, 428.

mission in the army and the being stationed at a place other than such locality; the party being at such place not by his own volition, and the *animus revertendi* to the original domicile being presumed to still subsist.<sup>1</sup> LV, 623, *January, 1888*.

2180. The legal residence of the father of a person who was a commissioned officer in the military service at the time when he became of age was Calais, Vermont. Soon after attaining his majority, the military station of this officer (he continuing in the army) was changed to Burlington, Vt., where he is now on duty. Sec. 63 of the revised statutes of Vermont provides that "no person shall gain or lose a residence by reason of his presence or absence while in the service of the State or of the United States." *Held* that the residence of the officer was still Calais, Vt., his status, after leaving there, not having been such as to enable him to acquire a new residence. 60, 223, *June, 1893*.

2181. The legal residence of an unemancipated minor is that of his father or parent, and as an officer of the army does not acquire a new legal residence by being temporarily on duty at a station, his unemancipated minor son could not acquire a legal residence at such place. Card 1220, *April, 1895*.

2182. A person in the military service of the United States, is entitled to vote where he has his *legal residence* provided he has the qualifications prescribed by the laws of the State. He does not lose such residence by reason of being absent in the service of the United States. The laws of a particular State in which he is stationed and has only a temporary as distinguished from a *legal* residence may however permit him to vote in that State after a certain period of actual residence. Cards 472, *October, 1894*; 601, *November, 1894*.

#### RESIGNATION.

2183. It has been held by a United States court<sup>2</sup> that "a civil officer has a right to resign his office at pleasure, and it is not in the power of the Executive to compel him to remain in office." In a case of a military officer, however, this right is subject to certain restrictions growing out of the military status. Thus while, in time of peace, an officer of the army, in good standing, is in general entitled to tender and have accepted his resignation, yet, in time of war or when grave embarrassment to the service or prejudice to discipline may result from his leaving his duty, the acceptance of his resignation may properly be refused. And so, where he has tendered his resigna-

<sup>1</sup> Jacobs Law of Domicile, 401.

<sup>2</sup> United States v. Wright, 1 McLean, 512.

tion while under charges, and a failure of justice might result from allowing him to evade trial. XIV, 129, *February, 1865*.

2184. A resignation does not become operative until the officer is officially notified of the acceptance of the same. Mere acceptance, without notice, does not give effect to the resignation. It is not till due notice of the same is received that the officer is legally separated from the army and made a civilian, and up to the date of such notice he is entitled to pay.<sup>1</sup> XLII, 68, *December, 1878*.

2185. A mere offer to resign or tender of resignation is revocable at any time before acceptance. But after an acceptance, and before effect has been given to the same by notice (see § 2184, *ante*), the offer can not be withdrawn or materially modified by the act of the officer alone, but the consent of the appointing power is also necessary. After due notice of the acceptance has been communicated, there can of course be no withdrawal of the tender<sup>2</sup> or revocation of the acceptance. XXXIX, 375; Card 2170, *April, 1896*.

2186. While a tender of his resignation by an *insane* officer is in general without legal effect and incapable of being legally accepted,<sup>3</sup> yet where a resignation tendered by an insane officer was, in the absence, at the War Department, of any knowledge of his insanity, formally accepted, and the vacancy created by the resignation was thereupon filled, *held* that the acceptance could not legally be revoked, and that the appointment to the vacancy was valid and operative.<sup>4</sup> XXXIX, 420, *February, 1878*.

2187. A resignation takes effect only upon acceptance by competent authority and notice of the same given to the officer. 36, 337, *November, 1889*; 42, 370, *August, 1890*. The acceptance of an officer's resignation becomes operative and severs him from the military service, upon his receiving either actual or constructive notice of such acceptance.<sup>5</sup> 50, 458, *December, 1891*; Card 6409, *May, 1899*.

2188. It is an established rule that when an order has been forwarded in the regular way to an officer's regiment it will be presumed, unless there is something to indicate the contrary, that it reached its destination and also that it was delivered to the officer affected thereby, unless he was absent from his regiment; and if he was absent without

<sup>1</sup> *Barger v. United States*, 6 Ct. Cls. 35, *Minumack's Case*, *infra*. And compare the wording of the 19th Article of War. That an officer is effectually detached from the army by an acceptance, duly communicated, of his resignation, and cannot thereafter be restored to the military service by a revocation of such acceptance, or by anything short of a reappointment, see the leading case of *Minumack v. United States*, in 10 Ct. Cls. 584, and 7 Otto, 426; also, 12 Opins. At. Gen. 555; 14 *id.* 262.

<sup>2</sup> 12 Opins. At. Gen. 406, 14 *id.* 261.

<sup>3</sup> 6 Opins. At. Gen. 456, 10 *id.* 229, 12 *id.* 557.

<sup>4</sup> See to a similar effect, 15 Opins. At. Gen. 469.

<sup>5</sup> Compare § 1204, *ante*.

authority, the receipt of the order at his proper station is held to be a constructive delivery to him. Thus, where, in 1863, notice of the acceptance of an officer's resignation was duly forwarded to and received by his regimental commander, but was not delivered to the officer because of his unauthorized absence, it was held that there was a constructive notice of acceptance which gave effect to the resignation, that the officer was properly thereupon dropped from the rolls, and that a subsequent order purporting to revoke the acceptance and dismiss him from the service was void and of no effect. Card 1289, *April, 1895*.

2189. The acceptance of a resignation is an executive act which may be exercised by the President through any proper officer selected by him, as by a military commander in the field. So, where such a commander, during the civil war upon a tender of resignation by an officer of his command, issued an order discharging the officer from the service, *held* that while such action could have no legal effect as a summary dismissal, it would properly be given effect as sufficient evidence of an acceptance of the resignation; the commander being without power to summarily dismiss an officer, but having been granted authority to accept resignations. 54, 205, *June, 1892*.

2190. There may be a tacit acceptance of a resignation. Thus, where in the civil war, an officer, having formally tendered his resignation, proceeded to leave permanently his regiment, and this act was treated as a legal severance, and continued to be acquiesced in as such by the official superiors and commanders of the officer, *held* that such acquiescence, under the circumstances, was sufficient evidence of a legal acceptance. 54, 138, *June 1892*.

2191. An unqualified acceptance of a resignation is treated as an honorable discharge from the service. Cards 3569, *October, 1897*; 2170, *April, 1896*; but where the acceptance was for "the good of the service," *held* that the discharge therefrom was not honorable. Card 427, *October, 1894*.

#### RETIREMENT.

2192. The provision of Sec. 1248, Rev. Sts., giving to a retiring board such powers of a court martial and court of inquiry as may be necessary to enable it to inquire into and determine a question of alleged disability, does not authorize such a board to entertain a charge of a military offence as such, or to *try* an officer. XX, 619, *May, 1896*.

2193. The investigation of a retiring board is not affected by any limitation of time, as is that of a court martial, viz., by Art. 103.



Such a board may therefore inquire into the matter of a disability, however long since it may have originated. XX, 619, *May, 1866*.

2194. The finding of a retiring board under Sec. 1251 or Sec. 1252, Rev. Sts., is in the nature of a recommendation, and till it is "approved by the President" no retirement can be ordered thereupon. XXVI, 104, *October, 1867*.

2195. It does not affect the authority to retire under Sec. 1251, Rev. Sts., that the incapacity of the officer may have been found to have resulted from a wound received by him while in the *volunteer* service before entering the regular army. XXVI, 104, *October, 1867*.

2196. Under Sec. 1252, Rev. Sts., an officer, may, in the discretion of the President, legally be retired by reason of an incapacity resulting from habitual drunkenness. XX, 622, *May, 1866*.

2197. The provision of Sec. 1253, Rev. Sts., that an officer shall not "be *wholly* retired from the service without a full and fair hearing before an army retiring board, if, upon due summons he demands it," may be said to entitle an officer subject to be thus retired, to appear before the board (with counsel if desired), and to introduce testimony of his own, and cross-examine the witnesses examined by the board, including the medical members of the board who may have taken part in the medical examination and have stated or reported to the board the result of the same.<sup>1</sup> XXIII, 626, *August, 1867*; XXXI, 603, *August, 1871*. If the officer does not elect to appear before the board when summoned, he waives the right to a hearing, and cannot properly take exception to a conclusion arrived at in his absence.<sup>2</sup> XX, 621, *May, 1866*.

2198. The provisions of Sec. 1275, Rev. Sts., that an officer wholly retired shall receive, upon retirement, one year's pay and allowances, entitles such an officer to receive a sum equal to the total of one year's pay and all the pecuniary allowances of an officer of his rank. XXIX, 360, *October, 1869*. And *held* that the fact that an officer, at the time of being wholly retired, was under a sentence of suspension from rank and pay, did not affect his right to receive such full sum upon the retirement. XXIX, 645, *January, 1870*. But officers wholly retired, unlike officers otherwise retired, are not entitled upon retirement to

<sup>1</sup> The provisions of Secs. 1245 and 1252, Rev. Sts., authorizing the President to "*wholly* retire" an officer, are not inconsistent with those of Sec. 1220 and the 10th Art. of War, prohibiting the dismissal of officers by executive order in time of peace. Sections of the same statute, as these are (see REVISED STATUTES, *post*), must all be given equal force and effect, unless repugnant and irreconcilable.

<sup>2</sup> It is held by the Attorney General 16 Opins. 20 that where an officer of the navy had been retired without having had, through no fault of his own, the full and fair hearing before the board to which he was entitled by Sec. 1455, Rev. Sts. and the vacancy on the active list occasioned by his retirement had not been filled, the President would be authorized to revoke the order of the retirement so that the officer might have the proper hearing, before final action in his case.

the authorized change of station allowance of baggage, etc., to their homes. Card 2071, *February, 1898*.

2199. Officers on the retired list of the army are entitled to the benefit of the provision of Sec. 1262, Rev. Sts., in regard to "service pay," in the same manner as other officers, subject of course to the provision of Sec. 1274.<sup>1</sup> XXXIV, 181, *March, 1873*.

2200. An officer on the retired list, being as much a part of the army as an officer on the active list, would be subject to trial by general court martial independently of the provision, specifically so subjecting him, of Sec. 1256, Rev. Sts.<sup>2</sup> XXXIII, 613, *December, 1872*.

2201. *Held* that retired officers of the army, though relieved in general from active military service, were nevertheless, as a part of the army, properly exempt from the public obligations peculiar to civilians, and were therefore no more liable than officers on the active list to be required to serve on juries. The question, however, of exemption is one for the determination of the courts; so, where a retired officer was summoned for jury duty in a United States district court, *advised* that he appear before the court, in compliance with the summons, and there urge to the judge the objection, arising from his military status, to his serving on a civil jury. XXXVII, 55, *October, 1875*.

2202. *Held* that, under the opinion of the Attorney General of June 11, 1877,<sup>3</sup> distinguishing between the receiving of compensation for extra services and of compensation for two distinct (and not incompatible) offices, a retired officer could legally hold the office of a clerk in the Quartermaster Department, and receive the pay of such office, while at the same time retaining his office in the army and receiving the pay of the same.<sup>4</sup> XLIII, 197, *February, 1880*.

2203. *Held* that the "cause" of "incapacity" intended in Sec. 1249,

<sup>1</sup> That an officer placed upon the retired list can not, by an executive order, be allowed any pay greater than or additional to that authorized by statute to be paid to retired officers, see 15 Opins. At. Gen. 442. The rank and pay of retired officers are matters within the control of Congress. *Wood v. U. S.*, 15 Ct. Cls. 151, and 107 U. S. 414.

<sup>2</sup> A retired officer, upon conviction, may be sentenced similarly to an officer on the active list, except that the punishments of suspension and loss of files or relative rank, are not appropriate to the status of a retired officer.

<sup>3</sup> 15 Opins. 303. And see *id.* 608, and 16 *id.* 7, based like the opinion referred to in the text, mainly upon the ruling of the U. S. Supreme Court in *Converse v. United States*, 21 Howard, 463.

<sup>4</sup> As to a person holding two distinct offices, places, or employments, see § 1812, *ante*, and notes. A retired officer is not prohibited by law from holding office in an executive department, nor from receiving the salary thereof in addition to his retired pay. *Collins v. U. S.*, 15 Ct. Cls. 22; *Meigs v. U. S.*, 19 *id.* 497; *Yates v. U. S.*, 25 *id.* 296; 19 Opins. At. Gen., 283. If the retired officer receives \$2,500 or more, the holding of any other office is forbidden, by sec. 2 of the act of July 31, 1894 (28 Stats. 205), except as specified in that act. See § 2210, *post*, and notes. See also sec. 7, act of July 3, 1896 (29 Stats. 245), as to employment of retired officers on rivers and harbors.

Rev. Sts., was a physical cause; that moral obliquity was not had in view; and that the matter of the financial integrity of the officer was beyond the jurisdiction of the board. So, *held* that the board was not authorized to recommend the retirement of an officer because he did not pay his debts. 41, 403, *July, 1890*. Held also that the inability of a disbursing officer to furnish a bond when duly required to do so was not sufficient ground for his retirement. 64, 53, *February, 1894*.

2204. *Held* that the law—Secs. 1248 and 1249, Rev. Sts.—contemplated an existing and not a purely prospective and contingent incapacity; and that an inquiry into an officer's general efficiency could be pertinent only in so far as it could be regarded as going to show that his inefficiency, if found, was the result of an impairment of health. 35, 49, *September, 1889*.

2205. The act of June 30, 1882, c. 254, provides that forty years' service, "either as an officer or soldier," shall entitle an officer to be retired. *Held* that, in computing the forty years' service the period served by the officer as a cadet at the Military Academy could legally be counted. 49, 379, *October, 1891*. Also *held* that the cadet service can be legally included in computing the thirty years' service upon which an officer may be retired on his own application in the discretion of the President, under Section 1243, Revised Statutes. Card 1699, *September, 1895*.

2206. The finding of a retiring board, approved by the President, is conclusive as to the facts. The board finds the facts and the President approves or disapproves the finding, but the law does not empower him to modify the finding or to substitute a different one. There is here a judicial power, vested in the two, and not in the President acting singly, and when the power has been once fully exercised it is exhausted as to the case.<sup>1</sup> 56, 426, *December, 1892*.

2207. Under the act of Oct. 1, 1890, c. 1241, s. 3, the finding of the board of examination that the officer is incapacitated for duty is not *per se* final, but must be reported for the action of the Secretary of War and passed upon by him. Where the finding and report of the board have been approved but not yet executed by actual retirement, there may intervene contingencies which would supersede such proceeding, as the trial and dismissal of the officer by court martial, or the arising of new causes which might make proper that the question of his disability be inquired into by a retiring board convened under Sec. 1246, Rev. Sts. But unless some such new occasion and ground of disqualification be presented, the action of the Secretary of War, in approving the report, remains final and exhaustive, and the officer

<sup>1</sup>See U. S. v. Burnhard, 125 U. S., 170.

is entitled to be retired under the act of 1890, and cannot legally be ordered before such retiring board. 61, 148, 269, *August and September, 1893.*

2208. The act of October 1, 1890, contemplates that before an officer can be retired under it, he shall be incapacitated for active service by reason of physical disability. The existence of that fact must be ascertained before the law can be applied. If an officer is regularly found incapacitated physically by an examining board appointed under the act, but before being retired recovers from his disability, he cannot legally be retired. Where such recovery is alleged a new examination is not only proper but necessary. Card 1929, *January, 1896.*

2209. Retired officers (except when assigned to duty under Sec. 1259, Rev. Sta., or other statutes) do not exercise public office.<sup>1</sup> They are in fact pensioners. The position and pay given them constitute a form of pension. They exercise no functions and receive no emoluments of office, but are pensioned for past faithful services or disabilities contracted in the line of duty. Their condition and a public office have no characteristics in common.<sup>2</sup> 63, 472, *February, 1894*; Card 2301, *May, 1896.*

2210. The act of Congress approved July 31, 1894 (28 Stats., 205), provides that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to, or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the army or navy whenever they may be elected to public office, or whenever the President shall appoint them to office by and with the advice and consent of the Senate." This legislation seems to assume that a retired officer holds a public office. This assumption is believed to be erroneous. The chief distinguishing feature of a public office is that its holder is vested with public functions<sup>3</sup> and this is not the case with a retired officer. The word "office" as used in this legislation should not therefore be construed to apply to the retired list of the army, notwithstanding the latter part of the quoted words would seem to indicate that such was the understanding. It is believed to have been a misunderstanding, however, and if a retired officer does not hold an office, there is, in the legislation under consideration, no prohibition addressed to him. But that a retired officer does not hold

<sup>1</sup> As to whether they hold public office, see note 1, page 623, *post*.

<sup>2</sup> See *People v. Duane*, 121 New York, 367 (note 1, page 623, *post*). Also, note to § 1811, *ante*.

<sup>3</sup> See under the head of "Office" note to § 1811, *ante*. Also, *Mechem, Public Officers*; *Am. and Eng. Ency. of Law* (1st edition), "Public Officer," and authorities cited.



an office has not always, nor even generally, been conceded.' But irrespective of this consideration the legislation does not apply to those whose salaries are less than twenty-five hundred dollars. Cards 1121, *March, 1895*; 2301, *May, 1896*; 8126, *May, 1900*.

2211. Sections 1259 and 1260, Revised Statutes, prescribe that retired officers shall not be assignable to any other duty than at the Soldier's Home and as professors of colleges. This legislation does not prevent them from holding offices outside of the regular army. By Sec. 1223, Rev. Sts., they are precluded from holding diplomatic and consular offices and this is the only existing prohibition. There is no prohibition against their holding commissions in the military forces other than the regular army, whether militia or volunteers, and whether appointed by the President or governors of States. Section 2 of the act of July 31, 1894 (28 Stats. 205), recognizes the legality of appointments of retired officers by the President, by and with the consent of the Senate, and such office may be office in the volunteer force as well as any other branch of the Government, except the regular army. And assuming that a retired officer holds an office within the meaning of this statute, governors of States may appoint them officers of volunteers, provided their annual compensation as retired officers is less than twenty-five hundred dollars, even if it should be held that they do not come within the description of "officers of the regular army" as that term is used in the tenth, eleventh and thirteenth sections of the act of April 22, 1898. Card 4051, *April, 1898*.

2212. Where an officer did not make the journey to his home under the order retiring him until one year and a half after his retirement, his claim for mileage was disapproved by the Secretary of War June 5, 1890, "for the reason that the journey \* \* \* to the place he

<sup>1</sup>In *People v. Duane*, 121 N. Y., 367, the Court of Appeals of N. Y. held, in a forcible and elaborate judgment, that a retired officer did not hold an office within the meaning of a statute of that State authorizing the appointment of aqueduct commissioners and providing that "they and their successors shall hold no other Federal, State, or municipal office except the offices of notary public and commissioner of deeds." The question as to whether retired officers hold offices was treated as doubtful by the Attorney General in an opinion as to whether General Snikles, a member of Congress, could receive his pay as a retired officer. 20 Opins., 686, but in this matter Second Comptroller Mansur held in an elaborate decision dated February 24, 1894, that "the place and rank on the retired list held by an officer of the army is a military office under the United States." The following cases treat retired officers as holding offices: *Tyler v. U. S.*, 16 Ct. Cls., 223; *U. S. v. Tyler*, 105 U. S., 244; *Wood v. U. S.*, 15 Ct. Cls., 151, and 107 U. S., 414; *Franklin v. U. S.*, 29 Ct. Cls., 6; *Badeau v. U. S.*, 130 U. S., 439; *In re Tyler*, 18 Ct. Cls., 25; *In re Winthrop*, 31 *ibid.*, 35; *State v. De Gress*, 53 Texas, 387; *Case of Major Smith*, 19 Opins. At. Gen., 283. See, also, 2 Comp. Dec., 7. Decision of Comptroller in the case of Capt. Godlee, 7 Comp. Dec. (dated February 6, 1901). In the cases of *Tyler* and *Winthrop supra*, the Court of Claims held that retired officers of the Army are officers within the meaning of Section 5498, Revised Statutes, which prohibits officers of the United States from acting as agents or attorneys for prosecuting claims against the Government.

now calls his home at so long a period after the date of his retirement cannot be considered as falling within the rule of giving an officer mileage when retired, to enable him to resume his residence at his home.<sup>1</sup> \* \* \* Applying the principle thus established to the case of a retired enlisted man who applied three years after his retirement for the transportation and subsistence which at the time of his retirement he was authorized to receive by G. O. 43, A. G. O., 1889, it was held that he had waived his right to such transportation and subsistence by not availing himself of it within a reasonable time after retirement. Card 2879, *March, 1897*. See Card 6466, *May, 1899*.

**2213.** *Held* that a retired officer summoned to attend a court martial as a witness is entitled to mileage for the travel involved, and to enable him to obtain the same proper orders should be issued in his case. 28, 291, *November, 1888*.

**2214.** There is no provision of law or regulation authorizing the payment of the burial expenses of a retired officer. A. R. 85 (99 of 1901) is limited, in the cases of officers dying at a military post, to those who die "when on duty" there, and therefore does not include retired officers who may die at a military post. Card 3602, *November, 1897*.

**2215.** It having been reported that a retired officer, against whom there were pending proceedings for alimony by his wife, was about to leave the United States to avoid the same, *held*, that it would be legal for the proper military authority to require the officer to remain within the jurisdiction of the civil court in which he had been proceeded against; the object being to protect the service from the disgrace which he would cast upon it by evading his obligations in such a case. Card 5946, *March, 1899*.

**2216.** Forage masters and wagon masters employed by the Quartermaster General under Sec. 1137, Rev. Sts., are not "enlisted," and therefore not entitled to be retired under existing law—act of Sept. 30, 1890, c. 1125. 51, 466, *January, 1892*.

**2217.** *Held* that the term "war service" in the proviso of the act of September 30, 1890, c. 1125, relating to the computing of the period of such service with a view to the retirement of enlisted men, included service as a commissioned officer equally with service as an enlisted man. 44, 209, *December, 1890*.

**2218.** An enlisted man on the retired list is subject to trial by court martial, and to dishonorable discharge by sentence, if such be adjudged.

<sup>1</sup> In this case the Comptroller of the Treasury later held (Vol. 4, p. 175) that an officer "retired and ordered to repair to his home should promptly obey the order and should be deemed to have selected the place to which he repairs within a reasonable time as his home."<sup>2</sup>

But the existing law, in entitling him to be retired if he complies with its conditions, evidently contemplates that he shall remain a pensioner on the bounty of the Government during the remainder of his life, if not forfeiting his claim by serious misconduct. So, *held* that retired enlisted men could not legally be discharged by executive order under the 4th Article of War, which contemplates soldiers on the active list only. LV, 305, *January, 1888*.

2219. *Held*, in the absence of any legislation to the contrary, that retired enlisted men, like retired officers,<sup>1</sup> might legally be employed, in any department of the Government, as clerks, messengers, watchmen, &c., and receive pay for such employment, while at the same time retaining their positions on the retired list and receiving retired pay. LVI, 144, 493, *May and September, 1888*.

2220. There is no statute of the United States or regulation of the War Department which prevents a retired enlisted man of the army from accepting an office or employment under either the United States or a State. *Held*, therefore, that there was no law or regulation of the United States which would prevent a retired enlisted man from organizing and drilling a militia company. Card 3638, *November, 1897*.

2221. An enlistment contrary to the 50th Article of War, or otherwise fraudulent, is not void but voidable only at the option of the United States. Until thus avoided it is valid and binding on both parties and service under it is valid service. *Held*, therefore, that time actually served under such enlistment should be counted in computing the thirty years necessary to entitle the soldier to retirement under the provisions of the act of Sept. 30, 1890 (26 Stats. 504). Cards 355, *September, 1894*; 2022, *January, 1896*; 7108, *October, 1899*.

2222. A marine, after serving nine years and six months in the marine corps, deserted therefrom in 1866, and subsequently while thus in desertion served about sixteen years in the army. *Held*, that if his service in the marine corps during the civil war was "active service" within the meaning of the act of February 14, 1885 (23 Stats., 305), as amended by the act of September 30, 1890 (26 Stats., 504), he would be eligible under said acts for retirement. Card 6693, *July, 1899*.

2223. The act of May 26, 1900, provides "that hereafter, in computing length of service for retirement, credit shall be given the soldier for double the time of his actual service in Porto Rico, Cuba, or in the Phillipine Islands." *Held*, that a soldier absent in the United States on sick or ordinary furlough while his company is stationed in Porto Rico, Cuba, or the Phillipine Islands cannot be considered as in "actual service" within the meaning of this statute, in the place where

<sup>1</sup> 15 Opins. At. Gen., 306.

his company is stationed, and he is not therefore, entitled to credit for double time during the period of such absence.<sup>1</sup> Card 8529, *June, 1900.*

**2224.** There is no legal objection to granting an enlisted man of the regular army an indefinite furlough to allow him to accept an appointment as an officer in the volunteer army, and having accepted such furlough and appointment, the period of their continuance may legally be counted as part of the thirty years service as an enlisted man, which would entitle him to retirement. Card 8696, *August, 1900.*

**2225.** Pay for certificate of merit (two dollars per month), like continuous service pay, has always been held to be a part of the soldier's pay. Being thus a part of the pay of the rank upon which the soldier receiving it may be retired, he is entitled to receive as a retired soldier seventy-five per centum thereof with his current pay. Card 1308, *April, 1897.*

**2226.** *Held* that a retired soldier may be furnished subsistence in kind instead of the commutation allowances during the time he may be in confinement at a military post under military charges, and either subsistence in kind or full commutation while en route under guard to or from the post. Card 3234, *June, 1897.*

#### REVIEWING AUTHORITY.

**2227.** This term is employed in military parlance<sup>2</sup> to designate the officer whose province and duty it is to take action upon the proceedings of a court martial after the same are terminated, and, when the record is transmitted to him for such action, to approve or disapprove, &c., the sentence. This officer is ordinarily the commander who has convened the court. In his absence, however, or where the command has been otherwise changed, his successor in command, or, in the language of Arts. 104 and 109, "the officer commanding for the time being," is invested (by those articles) with the same authority to pass upon the proceedings and order the execution of the sentence in a case of conviction. XIII, 468, *March, 1865.*

In cases, however, of sentences of dismissal and of death, imposed in time of peace, and of some death sentences adjudged in time of war, as also of all sentences "respecting general officers," while the convening officer (or his successor) is the original reviewing authority, with the same power to approve or disapprove as in other cases, yet, inasmuch as it is prescribed by Arts. 105, 106, 108 and 109 that the sentence shall not be *executed* without the confirmation of the President, the latter becomes in these cases the *final* reviewing officer, when—the

<sup>1</sup> Compare 6 Comp. Dec., 947.

<sup>2</sup> It occurs also in Sec. 1228, Rev. Sta.



sentence having been *approved* by the commander (for, if *disapproved* by him, there is nothing left to be acted upon by the superior)—the record is transmitted to him for his action. A similar division of the reviewing function exists in cases in which sentences are approved, but the execution of the same is suspended, and the question of their execution referred to the President, under Art. 111. The same function is also shared between inferior and superior commanders, under Art. 107, in cases in which sentences are imposed by division or separate-brigade courts.

Where a general court martial is convened directly by the President as Commander-in-chief, he is of course both the original and final reviewing authority.

2228. It is no longer necessary that the *findings* of a court martial should be expressly approved. Formerly the 104th Article of War prescribed that no sentence of a court martial should be carried into execution until the whole proceedings were approved by the reviewing authority, but now as amended by act of July 27, 1892, it simply requires that the sentence shall be approved by such officer, and this applies as well in cases requiring confirmation of the President as in those that do not. Card 2844, *January, 1897*.

2229. While *approval* gives life and operation to the sentence, *disapproval*, on the other hand, quite nullifies the same. A disapproval of the sentence of a court martial by the legal reviewing authority is not a mere expression of disapprobation, but a final determinate act, putting an end to the proceedings in the particular case and rendering them entirely nugatory and inoperative; and the legal effect of a disapproval is the same whether or not the officer disapproving is authorized finally to confirm the sentence. But to be thus operative, a disapproval should be *express*. As frequently remarked in the opinions of the Judge-Advocate General, the mere absence of an approval is not a disapproval, nor can a mere reference of the proceedings to a superior without words of approval operate as a disapproval of the sentence.<sup>1</sup> The effect of the disapproval, wholly, of a sentence is not merely to annul the same as such but also to prevent the accruing of any disability, forfeiture, &c., which would have been incidental upon an approval.<sup>2</sup> XXVI, 568, *June, 1868*; XXX, 497, *July, 1870*; XXXII, 1, *December, 1870*; L, 121, *March, 1886*; 60, 36, *June, 1893*; Card 2195, *April, 1896*.

<sup>1</sup> See 16 Opins. At. Gen. 312, where it is remarked that it is not a legal *disapproval* of a conviction or sentence for the original reviewing officer, in forwarding the proceedings for the action of superior authority, to endorse upon the same an opinion to the effect that the finding is not sustained by the evidence.

<sup>2</sup> A disapproval of a sentence by the proper reviewing authority is "tantamount to an acquittal by the court." 13 Opins. At. Gen. 460.

Where the original reviewing officer disapproves a sentence, to the execution of which the confirmation of superior authority is made requisite by the code—as where (in time of peace) the department commander, who has convened the court in the case of an officer, disapproves a sentence of dismissal adjudged thereby—the sentence being nullified in law, there remains nothing for the superior authority to act upon and to transmit the proceedings to him for action will be improper and unauthorized. III, 537, *August, 1863*; VII, 479, *April, 1864*; XXX, 497, *July, 1870*; XXXII, 630, *May, 1872*.

A reviewing officer cannot disapprove a sentence and then proceed to mitigate or commute the punishment, since, upon the disapproval, there is nothing left in the case upon which any such action can be based. XXII, 456, *October, 1866*.

It is quite immaterial to the legal effect of a disapproval whether any *reasons* are given therefor, or whether the reasons given are well-founded in fact or sufficient in law. XXVIII, 198, *October, 1868*.

2230. A reviewing officer cannot himself correct the record of a court martial by striking out any part of the finding or sentence, or otherwise (see § 2256, *post*); nor can he in general change the order in which different penalties are adjudged by the court to be suffered (see § 1146, *ante*); nor can he *add* to the punishment imposed by the court though deemed by him quite inadequate to the offence. (See § 2320, *post*.) He may, however, in general, specify the reasons for the action taken by him, without transcending his authority. Thus, where a department commander disapproved a sentence as inadequate, and, in stating his grounds for so doing, commented unfavorably upon the conduct of the accused as indicated by the evidence, *held* that such comments were a legitimate explanation of the action taken and did not constitute an adding to the punishment.<sup>1</sup> XIX, 676, *August, 1866*.

2231. Where the reviewing officer deems that the proceedings of the court are in any material particular erroneous or ill advised, his proper course in general will be to reconvene the court for the purpose of having the defect corrected, at the same time furnishing it with the grounds of his opinion. Thus if he regards the sentence inadequate, he should, in reassembling the court for a revision of the same, state why he so considers it. XI, 490, *February, 1865*. While he cannot compel the court to adopt his views in regard to the supposed defect, he may, in a proper case, express his formal disapproval of their neglect to do so. Thus where a court martial, on being reconvened with a view of giving it an opportunity to modify a sentence manifestly too lenient for the offence found, decided to adhere

<sup>1</sup> See as a marked instance of such comments, U. C. M. O. 104, *Navy Dept.*, Sept. 13, 1897.

to the sentence as adjudged, and, on being again reassembled to consider further grounds presented by the reviewing commander for the infliction of a severer penalty, again declined to increase the punishment. *held* that it was within the authority of the reviewing officer, and would be no more than proper and dignified for him, in taking final action upon the case, to reflect upon the refusal of the court as ill-judged, and as having the effect to impair the discipline and prejudice the interests of the military service.<sup>1</sup> IV, 579, *January, 1864*; XII, 546, *August, 1865*.

2232. In passing upon the findings and sentence of a court martial, the reviewing officer will properly attach special weight to its conclusions where the testimony has been of a conflicting character. This for the reason that, having the witnesses before it in person, the court was qualified to judge, from their manner in connection with their statements, as to the proper measure of credibility to be attached to them individually.<sup>2</sup> XXX, 383, 447, *May and June, 1870*; XXXV, 542, *August, 1874*; XXXVIII, 272, 325, *August and September, 1876*.

2233. The reviewing authority should properly authenticate the action taken by him in any case by subscribing in his own hand (adding his rank and command, as indicating his legal authority to act) the official statement of the same as written in or upon the record. (See § 2136, *k*, *ante*.) Impressing the signature by means of a stamp is not favored. IV, 567, *January, 1864*; XXII, 513, *December, 1866*; 568, *January, 1867*.

2234. A military commander cannot of course delegate to an inferior or other officer his function as reviewing authority of proceedings or sentence of a court martial, as conferred by the 104th or 109th Article of War or other statute. Nor can he, regularly, authorize a staff or other officer to subscribe for him the action, by way of approval, disapproval, &c., which he has decided to take upon such proceedings. An approval purporting to be subscribed by the commander, "by" his staff judge-advocate or other staff officer, would be open to question and quite irregular; as would also be any action subscribed by such an officer, purporting to be taken "in the absence and by the direction of" the commander. IV, 567, *January, 1864*; VII, 19, and VIII, 639, *July, 1864*; IX, 27, *May, 1864*; XV, 548, *July, 1865*; XVII, 191, *August, 1865*; XXVII, 207, *October, 1868*.

2235. Action taken by a reviewing officer upon the proceedings and sentence of a court martial may be recalled and modified *before* it is

<sup>1</sup>See G. C. M. O. 88, A. G. O., 1864.

<sup>2</sup>See the early case of Capt. Weisner, *Am. Archiv.*, 5th Series, vol. II, p. 895. So, civil courts will rarely interfere, except in cases of clear injustice, with verdicts of juries which have turned upon the credibility of witnesses. *Wright v. State*, 34 Ga. 110, *Whitten v. State*, 47 id. 297.

published and the party to be affected is duly notified of the same. After such notice the action is beyond recall. The power of *remission* indeed may be exercised so long as any part of the punishment imposed remains unexecuted. (See § 344, *ante*.) But when the final approval of the sentence (or other action taken) has been once officially communicated to the accused, the function and authority of the reviewing authority *as such* over and respecting the same is *exhausted* and cannot be revived. An approval cannot then be substituted for a disapproval, or *vice versa*. VIII, 556, *June, 1864*; XXXI, 15, *October, 1870*.

2236. It is an established principle that when the final action of the reviewing officer has been published in orders to the command and notified to the accused, his power of approval and disapproval in the case is exhausted, and his action cannot be recalled or modified. 31, 125, *March, 1889*; 40, 226, *April, 1890*; 60, 179, *June, 1893*. Where a department commander applied to the War Department for the return of the proceedings of a case in order that he might modify his action thereon, *held* that as the same had been formally promulgated in orders and had duly taken effect, the power of the reviewing officer over the case was exhausted, and the application could not legally be complied with. 31, 96, *March, 1889*.

2237. Where a reviewing authority has approved a sentence which is in excess of the legal limit, but which can be reduced to the same by simply cutting off a part of the punishment without changing it in kind, it is within his power to thus reduce it. This should be done in an order by the reviewing authority, or his successor in command, setting aside as void and inoperative that portion which is in excess of the legal limit. The preceding section should not be construed as precluding such action. Card 7363, *November, 1899*.

2238. *Held* a good ground for the disapproval of a sentence that the court denied the request of the accused to have summoned a clearly material and important witness whose testimony would not have been merely cumulative.<sup>1</sup> XLIX, 18, *April, 1887*.

2239. It is beyond the power of the reviewing officer to change, by his own action, a finding. Thus where, in a case of conviction of desertion, the reviewing authority approved so much only of the finding of guilty of desertion as convicted the accused of absence-without-leave, *held* that he thus substituted a finding of his own for that of the court, and that his action was unauthorized. XLVII, 291, *August, 1887*; 49, 445, *October, 1891*; 62, 454, *December, 1893*.

2240. It is within the authority of a department commander, as reviewing officer, in a case in which a soldier of his command has been

<sup>1</sup> See G. C. M. O. 128, A. G. O. of 1876.



sentenced to confinement in a penitentiary, to designate a particular penitentiary within such command as the place of confinement.<sup>1</sup> 63, 330, *January, 1894*.

2241. A sentence, to forfeit certain pay, was approved, and such approval promulgated in orders of Feb. 18, 1865. On March 10th following, the reviewing officer "reconsidered" his action and by another order disapproved the sentence, and this order was also promulgated. *Held* that the latter order was of no effect. The first order executed the forfeiture, making the amount forfeited public money, and exhausted the power of the reviewing authority. 40, 353½, *April, 1890*.

2242. But where, after the reviewing commander had approved a sentence in general orders, and the court had been *dissolved*, it was discovered that there was a *fatal defect* in the proceedings in that they did not show that the court and judge-advocate had been sworn in the case, *held* that the commander would properly issue a supplemental order declaring the proceedings a nullity and the original order inoperative and withdrawn on account of the defect.<sup>2</sup> XLIX, 308, *August, 1886*; 31, 125, *March, 1889*; 41, 39, *May, 1890*; 42, 439, *September, 1890*. (See § 2143 *ante*.)

2243. In acting upon the proceedings of a court martial, the legal reviewing officer acts partly in a judicial and partly in a ministerial capacity. He "decides" and "orders" (par. 1041, A. R. 465 of 1895; 1057 of 1901), and the due exercise of his proper functions cannot be revised by superior military authority. Thus *held* that a reviewing officer who had duly acted upon a sentence and promulgated his action in orders, could not be required by a higher commander, or by the Secretary of War, to revoke such action. If the sentence be deemed unwarranted or excessive, relief may be extended through the power

<sup>1</sup> See A. R. 941 (1042 of 1901), which makes approval of Secretary of War necessary.

<sup>2</sup> See G. C. M. O., 23, Dept. Dakota, 1888, setting aside void sentences and restoring to duty the prisoners, both of whom were serving confinement, and had been under the terms of the void sentences dishonorably discharged. See also G. C. M. O. 20, Dept. Cal., 1890, where a void sentence was set aside, the dishonorable discharge "cancelled" and the prisoner restored to duty.

If however the court has not been dissolved it may be reconvened to amend its record to conform to the actual facts, that is to make it speak the truth. See par. 19, S. O. 99, A. G. O., 1900, in which the following is promulgated: "By direction of the President, the sentence in the case \* \* \* published in paragraph 1, Special Orders, No. 214, Headquarters, Separate Brigade, Provost Guard, Manila, Philippine Islands, November 8, 1899, is set aside. The record of the trial failed to show that the members of the court and judge-advocate were sworn, and on being returned [by the War Department] for necessary action the court was not reconvened, as contemplated by paragraph 2, page 58, Court-Martial Manual, 1898, but the judge-advocate interlined a statement in the record that the members of the court and the judge-advocate were duly sworn. This action was unauthorized and invalid. A defective record returned for correction can only be amended to conform to the actual facts and by the court itself on revision when duly reconvened for the purpose."

of pardon or remission; if void for want of jurisdiction or other cause, it may be set aside. XLIX, 264, *August, 1885*; L, 553, *July, 1886*.

2244. The publication in orders of the sentence of a court martial is not essential to give it effect. The final approval and orders of the proper reviewing authority are the essential things, and actual or constructive notice of this may be given to the person affected otherwise than by its publication in orders, which is in fact simply for the sake of convenience and example. Card 1226, *April, 1895*.

2245. The formal disapproval by the reviewing authority of an acquittal is a naked non-concurrence in the conclusions of the court, and is without legal effect upon the status of the accused. He still remains legally not guilty. Card 1418, *June, 1895*.

#### REVISED STATUTES.

2246. The Revised Statutes are a single act of Congress, which, in the absence of any special provision as to the date on which the same (or any part of the same) should take effect, went into operation on the day of its approval by the President--June 22, 1874.<sup>1</sup> The date of the certificate, published with the same, of the Secretary of State, viz., Feb. 22, 1875, simply fixes the time at which the contents of the printed volume became evidence of the laws therein contained. XXXVI, 630, *August, 1875*.

2247. The laws relating to the army, embraced in the Revised Statutes, became operative as to the army upon the approval by the President of the body of the revision, irrespective and independently of any publication of such laws in general orders. XXXVI, 666, *September, 1875*.

2248. *Held* that an act of 1856, authorizing the transfer of certain lands in Florida (which had been reserved for military purposes) to the Secretary of the Interior, with the consent of the Secretary of War, and their disposition and sale as public lands, belonged to the class of "provisions of a local or temporary character" indicated in the proviso to Sec. 5596, Rev. Sts., and was therefore not repealed by such statutes, but, having remained unexecuted, might legally be executed at this time (1878). XLI, 215, *April, 1878*.

<sup>1</sup> Since the date of this opinion, the revision of 1874 has been itself revised, under an act of Congress of March 2, 1877, and the re-revision, published in 1878, and certified to by the Secretary of State, constitutes "legal evidence of the laws therein contained." This second revision, however, is not a new statute, but merely a "new edition" of the Revised Statutes of 1874, with additions and corrections.

Under a joint resolution of Congress, of June 7, 1890, and an act of April 3, 1890, a supplement to the Revised Statutes was published, by which the revision was brought down to March 3, 1891. By a second volume of the supplement, the revision has been brought down to March 3, 1899.

## REVISION.

2249. Where the record of a trial, as forwarded to the reviewing authority for his action, is deemed by him to exhibit some error, omission, or other defect, in the proceedings capable of being supplied or remedied by the court; as, for example, an inadequate, illegal, or irregular sentence, or a finding not authorized by the evidence; or an omission of some material matter—as a failure to prefix to the record a copy of the convening order, or to authenticate the proceedings by the signatures of the president and judge-advocate, or to enter the proper statement as to the members present, or to recite as to the offering to the accused of an opportunity to object to the same or as to the qualifying of the court by the prescribed oaths, or to fully record the plea, finding or sentence; or some mere clerical error in a matter of form:—the court may and in general properly will be reconvened by the order of the reviewing officer (the convening authority or his successor in the command) for the purpose of correcting the record in the faulty particular, provided a correction be practicable. In a case of an *omission*, the object of course is that the record may be made to conform with the *fact*. If the fact is that the proceeding, *apparently* merely omitted to be recorded, was *actually* not had, the proposed correction cannot of course be made. There is no limit to the number of times that a court may be reconvened for a revision of its proceedings. It is not often however reassembled a second time, where it declines on the first occasion to make the correction desired. I, 487. *December, 1862*; II, 154. *April, 1863*; XI, 490. *February, 1865*; XVI, 202. *May, 1865*; XXVIII, 286. *December, 1868*; 304. *January, 1869*.

2250. The order reassembling the court will properly indicate the particular or particulars as to which a revision or correction is desired, or refer to papers, accompanying it, in which the supposed omission or other defect is set forth. XI, 93. *November, 1864*. Whether to make or not the proposed correction will be in the discretion of the court. The reviewing authority cannot of course compel and would scarcely be authorized to *command* the court to make it. VII, 112. *November, 1863*; XXXIV, 435. *September, 1873*.

2251. A correction can be made only by a legal court. At least five therefore of the members of the court who acted upon the trial, must be present. That there are fewer members at the re-assembling than at the trial is immaterial, provided five are present. XXXV, 656. *October, 1874*. The judge-advocate should be present.<sup>1</sup> I, 487. *December, 1862*.

<sup>1</sup> If the court closes he should withdraw (act of July 27, 1892, - 2)

**2252.** It is not in general necessary or desirable that the accused be present at a revision. Where, however, any possible injustice may result from his absence, he should be required or permitted to be present, and with counsel, if preferred. Thus, where the defect to be corrected consists in an omission properly to set forth a special plea made or objection taken by the accused, it may be desirable that he should be present in order that he may be heard as to the proper form of the proposed correction. Where the error is *clerical* merely, or, though relating to a material particular, consists in the omission of a formal statement only, the presence of the accused is not in general called for. IX, 653, *September, 1864*.

**2253.** It is now settled in our law that a court martial is not empowered, at this proceeding, to take or receive testimony.<sup>1</sup> XVI, 362, *September, 1865*; XIX, 41, *October, 1865*; XLII, 275, *April, 1879*.

**2254.** The amendment can only be made by the court when duly reconvened for the purpose, and when made must be *the act of the court as such*. A correction made by the president or other member, or by the judge-advocate, independently of the court, and by means of an erasure or interlineation or otherwise, is unauthorized and a grave irregularity.<sup>2</sup> XXVIII, 304, *January, 1869*. The correction must be wholly made and recorded in and by the formal proceedings upon the revision. The record of the correction, as thus made, will refer of course to the page or part of the record of the trial in which the omission or defect occurs; but this part of the record must be left precisely as it stands. The court is no more authorized to correct the same by erasure or interlineation on the page, or by the substitution for the defective portion of a re-written corrected statement, than would be the judge-advocate or a member. II, 97, *March, 1864*; XI, 93, *November, 1864*; XVI, 202, *May, 1865*; XXXIV, 416, *August, 1873*; XLV, 439, *September, 1882*. (See §§ 2136, 1, and 2143, *ante*.)

**2255.** Where, after a sentence had been duly adjudged, and the record forwarded to the reviewing officer, a majority of the members of the court transmitted to him a written statement to the effect that the sentence was intended to have a certain meaning not conveyed by its terms — *i. e.*, was not intended to operate as a forfeiture of certain pay clearly forfeited by it as recorded — *held* that such irregular statement could have no effect as a correction of the sentence; that the proposed correction could only be made by the court itself, after having been reconvened to reconsider the sentence. XXXIII, 347, *September, 1872*.

**2256.** The reviewing officer himself can have no authority to make a correction in any part of the record. Thus where, upon a specifica-

<sup>1</sup> See G. O. 47, Hdqrs. of Army, 1879.

<sup>2</sup> See par. 19, S. O. 99, A. G. O., 1900, quoted in note to § 2242, *ante*.



tion duly setting forth a military offence, a court martial found an accused "guilty but without criminality," and the reviewing commander, in disapproving this contradictory finding, ordered that the words after "guilty" be treated as struck out of the record, *held* that, however objectionable the finding, the reviewing officer could not himself assume to correct it. If he desired it amended, he should have formally reconvened the court for the purpose. XII, 230, *January, 1865*. Nor has the War Department authority to correct the findings or sentence of a court martial. Card 1624, *December, 1895*.

2257. Where the court has been *dissolved*, or, by reason of any casualty or exigency of the service, cannot practically be reconvened, there can of course be no correction of its proceedings. XXXI, 108, *December, 1870*.

2258. The procedure here contemplated is of course quite distinct from the ordinary revision and correction of its proceedings by a court martial from day to day during a trial and before the record is completed. XXVII, 581, *March, 1869*.

#### RIGHT OF WAY.

2259. Where an act of Congress grants to an individual or corporation a right of way (or other franchise), no formal *acceptance* of the same is necessary. By simply acting under the grant, the grantee accepts the same with all its conditions. 59, 418, *May, 1893*.

2260. Where a grant of a right of way is made by the United States to a particular grantee over lands of the United States, but without designating the precise strip of land in the entire body of land which is to be occupied, it is held by recent authority that if the grantee selects such way, and the grantor does not object to such selection but silently acquiesces therein, he substantially constitutes the grantee his agent for such selection, and himself joins, in law, in the selection, and the title to the tract selected passes to the grantee.<sup>1</sup> This ruling *held* applicable to the case of the right of way through the Fort Leavenworth military reservation, granted to the Kansas and Missouri Bridge Company, by the act of July 20, 1868, c. 179. 50, 395, *December, 1891*.

2261. The right of way granted to the Northern Pacific Railroad Company by sec. 2 of the act of July 2, 1864, c. 217, unlike the grant of lands by sec. 3, was subject to no exceptions or limitations. So, *held* that the fact that, subsequently to the date of the act, the President reserved land on the line of the railroad for military purposes, before the company had definitely fixed its line and filed its maps, did not affect the right of way as granted by the act, and that such

<sup>1</sup> *Railway Co. v. Aling*, 99 U. S. 468; *Onthank v. Railroad Co.*, 71 New York, 198.

way was not interrupted by such reservation.<sup>1</sup> XLIX, 357, *October, 1885*.

2262. Where an enactment of Congress (the River and Harbor Appropriation Act of Sept. 10, 1890) required the Secretary of War to "acquire the title" to certain lands sufficient for a right of way for a canal, *held* that a contract of conveyance made with the owner of the land, a railroad company, by which a use was granted of such way jointly with the company, was not a compliance with the law, and that if no better title could be obtained by agreement, the Secretary should proceed to the alternative (authorized in the act) of causing the premises to be condemned. 51, 184, *January, 1892*.

2263. The act of September 10, 1888, c. 999, relating to rights of way of railroads through water-reserve lands in Wisconsin, confirms, as to that State, the rights of way given by the act of March 3, 1875, c. 152. 32, 223, *May, 1889*. But the act of 1888 leaves these rights still subject to the right of flowage, which, under the authority of the United States, may need to be resorted to in connection with the improvement of the Mississippi River, and subject also to the condition that no railroad company shall take material for construction from the water-reserve lands outside the right of way. 33, 489, *July, 1889*. Where the location of a railroad has been approved by the Secretary of the Interior, and its right of way perfected, under the act of 1875, it is not required that there should be a re-approval by the Secretary of War under the act of 1888. 31, 352, *April, 1889*; 33, 156, *June, 1889*. An approval by the Secretary of War, under the act of 1888, of the location of a right of way for a certain railroad, not recommended until the company file with their application a perfect profile and full and minute description of the proposed line. 29, 253, *January, 1889*.

2264. Questions of rights to the use of *water* in States and Territories, where the rainfall is not sufficient to supply the land with water for irrigation, are determined by rules not found in the common law. In England and generally in this country the right of one person to conduct water over the land of another is an interest in real estate which must be conveyed by deed. In districts where there is sufficient rain to fertilize the land there is no reason for distinguishing this interest from other easements in the soil. In regions where the fertility of the soil is dependent upon irrigation, a different principle arises. By it the right of a person, who cannot otherwise secure a necessary supply of water, to enter the land of another for such purpose, is recognized.<sup>2</sup> The use of this right is secured and regulated

<sup>1</sup> See Railroad Co. v. Baldwin, 103 U. S. 426, 18 Opins. At. Gen. 357.

<sup>2</sup> Yunker v. Nichols, 1 Col. 551. But, it seems, that in the absence of statute the person would have no right to construct a ditch on the lands of another without the owner's consent. Gould on Waters, 3d edition, § 233.

by statute in the western States, and is further recognized by Congress in the act of March 3, 1891, c. 561, s. 18-20, which extends to individuals and associations the right to enter the *public* lands and reservations of the United States, and have a right of way upon the same for the construction of irrigating ditches.<sup>1</sup> So *held* that where an individual had constructed such a ditch over the soil of a military reservation in Wyoming, after filing the map of the line of the same required by s. 20, of the act, his use of the water could not be controlled or interrupted by the military authorities so long as he did not, by the location of his right of way "interfere with the proper occupation" of the reservation by the Government (sec. 18 of the act). XLIX, 97, *May, 1885*; 55, 268, *September, 1892*.

2265. By sections 18 and 20 of the act of March 3, 1891 (26 Stats. 1110-2), the right of way is granted across the public lands and reservations of the United States for the construction of irrigating ditches, subject to the approval of the location of right of way across a reservation by the department of the Government having jurisdiction of such reservation. Where the Secretary of War, under this statute, approved the location of a right of way across a military reservation, but subject to certain conditions for the benefit of a third party, *held* that the Secretary of War was without authority to compel the grantee of the right of way to comply with the conditions, or to deprive him or his assigns of such right of way on account of his or their failure to comply with the conditions. Card 1063, *May, 1896*.

2266. The vesting of a right of way in the United States does not merely authorize the Government to send its agents and employees on the land for purposes of construction, &c., but endows it with such right and control as to enable it to keep the way open and ensure its continued use for the purposes designed. But where it was proposed to cede to the United States a right of way from a city, by one of its laid-out streets, to an adjacent national cemetery, *held* that the municipality, in the absence of specific authority conferred by the legislature, was not empowered to convey such a right, but that the legislature alone could do so, just as the legislature alone could vacate or discontinue a street.<sup>2</sup> 30, 45, *January, 1889*.

2267. So, *held* that an appropriation made by Congress for constructing a road from a city, through one of its streets, to a national cemetery, could not legally be expended upon a right of way granted by a city ordinance, the legislature not having delegated such jurisdiction over its streets to the municipality, which could not therefore transfer

<sup>1</sup> As to the operation of the act of July 26, 1866, and other prior enactments relating to this subject, see *Brader v. Water Company*, 101 U. S. 274; *Sturtevant v. Beck*, 133 *id.* 541. See, also, *Gould on Waters*, 3d edition, § 240, and authorities cited.

<sup>2</sup> *Dillon on Municipal Corporations*, 647, 652, 665; *Kreigh v. Chicago*, 86 Ill. 407.

to a third party a permanent property therein. 54, 423, *July, 1892*. *Held* that where such a municipality had not been empowered to convey a right of way outside its corporate limits, the conveyance should be made directly to the United States from the individual owners of the land, and that for the latter to convey, mediately, to the city would be an unnecessary proceeding. 29, 68, 69, *December, 1888*.

2268. Without express authority from Congress, the Secretary of War cannot grant to railway companies rights of way over the lands of the United States under his control, but he has frequently by revocable license granted permission to lay and maintain railway tracks upon such government lands. Cards 241, *August, 1894*; 6539, *June, 1899*.

#### RIVER COMMISSIONS.

2269. *Held* that the maps prepared by the Mississippi commission, under appropriations by Congress, may legally be disposed of at the discretion of the commission: it being evidently intended by Congress that the information therein contained should be made public and circulated for the public use and benefit. 33, 326, *July, 1889*.

2270. *Held* that the Mississippi River Commission derived no authority from the statutes relating to its functions to make allotments of the moneys appropriated by Congress for the improvements proposed. Its province is to indicate to Congress what improvements are needed and how much should be appropriated therefor. It has no authority to disburse money appropriated. An allotment made by it is to be treated by the Secretary of War as a recommendation only. The Secretary may adopt the recommendation, but in the disbursement should not omit any of the works specially designated by Congress in the appropriation act. 43, 187, *October, 1890*.

2271. *Held* that the allowances for the traveling expenses of the civilian members of the Mississippi and Missouri river commissions were not regulated by any order of the War Department regulating the allowances of civil employees of the military establishment, but were such as are fixed by statute. They are not thus necessarily four dollars *per diem*, since the statute law provides for the reimbursement of their actual necessary outlay, which may be more or less than this allowance. 44, 477, *January, 1891*.

2272. The duties, under the law, of the Missouri River Commission, composed partly of civilians, relate exclusively to certain work quite other than the establishing of harbor lines. It is therefore not, as a body, subject to the directions of the Secretary of War in the matter of establishing harbor lines, nor are the civilian members subject individually to his orders. Thus, while they may consent to establish such lines, it is preferable for the Secretary to cause such work to be done through engineer officers of the army. 56, 218, *October, 1892*.



## S.

## SALE, &amp;c., OF ARMS, &amp;c., BY SOLDIERS.

**2273.** *Held* that the provisions of s. 23, c. 75, act of March 3, 1863, prohibiting the sale, &c., of their arms, &c., by soldiers, and declaring that no right of property or possession should be acquired thereby, &c., were not limited in their operation to the period of the civil war, but were still in force,<sup>1</sup> and that an officer of the army would therefore be authorized to seize arms, &c., disposed of contrary to such prohibition, whenever and wherever found. XXII, 525, *December, 1866*. But inasmuch as there have been sundry authorized sales of arms and other ordnance stores since the end of that war, *advised* that officers, before making seizures, should assure themselves that the parties in possession have not acquired title in a legal manner. XXIX, 187, 204, *August, 1869*.

**2274.** A person who illegally purchases army clothing from a soldier cannot now be proceeded against for merely purchasing or receiving, under the existing law (Secs. 1242 and 3748, Rev. Sts.); but if, in so purchasing, he aids a soldier to desert, he is subject to trial and punishment under Sec. 5455, Rev. Sts. 80, 371, *July, 1893*.

**2275.** Sec. 3748, Rev. Sts., provides that clothing furnished by the United States to a soldier shall not be bartered, exchanged, pledged, loaned or given away, and that no person not a soldier or officer of the United States who has possession of any such clothing so furnished and which has been the subject of such sale, barter, etc., shall have any right, title or interest therein, but that the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster or other officer authorized to receive the same, that the possession by a civilian of clothing, etc., furnished to a soldier shall be presumptive evidence of the sale, barter, exchange, etc. The language of this statute indicates that a summary seizure is intended to be authorized and the fact that the military officer is authorized to seize the property shows that no writ or other process of the courts is required. But while the power to summarily make the seizure exists, the officer authorized to take possession of the property may also assert his rights through the courts, and this latter course may be in many cases the preferable and better one. Card 5303, *November, 1898*.

<sup>1</sup> See these provisions as now incorporated in the Revised Statutes, in Secs. 1242 and 3748. The further provision of the original Act making punishable with fine and imprisonment persons purchasing from soldiers their arms, equipments, clothing, &c., has not been retained in the Revised Statutes.

2276. A soldier's title to clothing issued him is a qualified one, requiring that he use it in the service while it is serviceable and he is yet a soldier. But on his discharge his title to such clothing becomes absolute and he may then sell, etc., the same to a civilian and give a valid title to it. *Held*, therefore, that Sec. 3748, Rev. Sts., did not apply in the case of such sale, barter, etc., by a discharged soldier. Card 5303, *November, 1898*.

#### SALE OF CONDEMNED STORES.

2277. In view of the general authority vested in the President and Secretary of War by the provision, in regard to the sale of military stores damaged or unsuitable for the public service, of the act of March 3, 1825 (now contained in Sec. 1241, Rev. Sts.), *held* that such stores might legally be sold *on credit*, if such mode of disposition was deemed for the public interest. XXIX, 330, *October, 1869*.

2278. *Held* that an officer of the army, duly charged with the duty of making a sale of damaged, &c., medical supplies under the authority of Sec. 1241, Rev. Sts. (by which the President is empowered to order such sales in certain cases), could not lawfully be required to take out and pay for a license as a merchant under the laws of the State in which the sale was to be made. Such a requirement would be a restriction upon the regular and legal execution of the powers of the general government, and therefore beyond the authority of a State. XXXIX, 6, *May, 1876*.

2279. The word "unsuitable," as used in Sec. 1241, Rev. Sts., evidently refers to some unfitness for use other than that caused by being "damaged." Uniform clothing, for instance, of sizes that could not be used would be *unsuitable*. But *held* that the meaning of the word could not properly be restricted to things of a quality inferior to that which is required for the service. A thing may be unsuitable by reason of its being of such superior quality as not to be adaptable for the purpose for which it was intended. And *held* that military stores can not properly be deemed *unsuitable* under this statute for the sole reason that they are *in excess of the quantity* required for use.<sup>1</sup> 64, 218, *March, 1894*; Card 7796, *March, 1900*.

2280. Certain government property (a quantity of cord wood and a hay scale) was left on hand at a military post which had been abandoned. The property was no longer needed there and the expense of transporting it elsewhere would largely exceed its cost. *Held*, there-

<sup>1</sup> See Comptroller's opinion *contra* of December 4, 1900 (7 Comp. Dec., 260), which, however, cannot be regarded as having the weight of authority, inasmuch as the Comptroller, in rendering the opinion, was not acting within the jurisdiction conferred upon him by the act of July 31, 1894.

fore, that it was "unsuitable for the public service" within the meaning of Sec. 1241 Rev. Sts. Card 8795, *August, 1900*.

**2281.** *Held* that under Sec. 1241, Rev. Sts., unserviceable tools and materials, which had been in use at a national cemetery, could not legally be ordered to be sold upon the mere inspection and report of their unserviceableness made by the superintendent of the cemetery, but that, as required in the section, there must be first an inspection "by an officer (*i. e.*, commissioned officer) designated by the Secretary of War." LIV, 609, *February, 1888*.

**2282.** Old material, condemned stores, &c., in the departments can not legally be disposed of in exchange for new, or in part payment for new, articles, but, under Sec. 3618, Rev. Sts., must be sold, and the proceeds "covered into the Treasury as miscellaneous receipts." So *held* in regard to an inserviceable steam lithographic press in the Signal Office, which had been duly inspected and condemned.<sup>1</sup> LII, 316, *June, 1887*; 37, 204, *December, 1889*.

**2283.** Books for a post library purchased out of post exchange funds or donated to the library are not "public property" within the meaning of Sec. 3618, Rev. Sts. Proceeds from a sale of them may therefore legally be expended in the purchase of new books. Card 2649, *September, 1896*.

**2284.** *Held* that a non-commissioned officer, who acted as *auctioneer* at a public sale of condemned quartermaster stores, could not legally be paid, out of the proceeds of the sale, a commission of ten per cent, or any other commission or compensation, for his services as auctioneer. The pay and allowances of all enlisted men are fixed by law, and, in the absence of any authority in the statute providing for such sales or other statutory provision, such a compensation must necessarily be without legal sanction. 60, 363, *July, 1893*; 62, 95, *October, 1895*. (See § 1336, *ante*.) But *held* that a civilian employee hired by the Quartermaster's Department, under the provision for "hire of teamsters and other employees" in the appropriation for "transportation of the army and its supplies," whose pay is not fixed by "law or regulations," may legally be paid for services as an auctioneer at a public sale of condemned quartermaster property. Cards 2567, *September, 1896*; 6988, *September, 1899*.

**2285.** Section 1241, Revised Statutes, provides: "The President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged or unsuitable for public service. Such inspection or surveys shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations pre-

<sup>1</sup> Compare a similar case in 15 Opns. At. Gen. 322.

scribed by him." *Held*, that before a sale can be made under this statute, the property must be inspected and pronounced unsuitable for public service, and the regulations (A. R. 679 of 1895) require the sale to be at public auction. Cards 935, *February, 1895*; 2127, *March, 1896*; 8184, *May, 1900*; 8668, 8675, *July, 1900*; 8716, *August, 1900*.

2286. Par. 679, A. R. of 1895 (761 of 1901), relates only to public property in the custody of the military establishment and not to property held by the War Department proper, which is a civil establishment. So *held*, that the regulation did not apply to public property for which the Chief of the Supply Division of the War Department is responsible. Card 3774, *January, 1898*.

#### SALE OF INTOXICANTS.

2287. The act of June 13, 1890, c. 423, provides "that no alcoholic liquors, beer or wine, shall be sold or supplied to the enlisted men in any canteen, or post trader's store, or in any room or building at any garrison or military post, in any State or Territory in which the sale of alcoholic liquors, beer, or wine, is prohibited by law." This act applies to all posts, whether or not on military or Indian reservations. It is also applicable to counties in which under a legal "local option law" the sale of intoxicants is prohibited. Card 4785, *August, 1898*. It is operative in North Dakota, a State in which the sale of such liquors is "prohibited by law." Under the act of July 23, 1892, c. 234, amending Sec. 2139, Rev. Sts., the Secretary of War may give authority in writing for the introduction of intoxicating liquors into the Indian country. But this authority is subject to the restriction of the existing act of June 13, 1890, so that the Secretary could not properly permit the introduction of such liquors into Indian country within a prohibition State with a view to their being sold or supplied to enlisted men. Where certain "Hop Tea Tonic," alleged to be intoxicating, was attempted to be introduced at the post of Fort Yates, situated upon an Indian reservation in North Dakota, exclusive jurisdiction over which is vested in the United States, *held* that the admission or sale of such liquor, if intoxicating, would be an offence against the United States, not against the State, since the act of August 8, 1890, providing that intoxicating liquor shipped into a State shall be subject to the operation of the State laws as soon as it enters the territory of the State, can not apply to a district over which the United States has exclusive jurisdiction, and therefore that the State authorities would not be empowered to make a *seizure* of such liquor. 62, 405, *November, 1891*.

2288. The act of June 13, 1890, forbids the sale of intoxicants to



"enlisted men" at military posts in prohibition States or Territories; but *held* that there was no existing law prohibiting the sale of liquors (once legally introduced—see § 1501, *ante*) to officers of the army or to civilians at such posts by post traders or otherwise. 65, 260, *June, 1894*.

2289. It having been reported that the unrestricted sale by civilians of opium was causing injury to the military service at Fort Sherman, Idaho—*advised* that such sale might be restrained by Congress under its general power of legislation over the Territories;<sup>1</sup> or that, in the absence of action by Congress, the legislature of the Territory would be authorized to regulate the same; and that through one of these two means the evil might probably be abated. 30, 72, *February, 1889*.

2290. Section 17 of the act for increasing the efficiency of the army of the United States, etc., approved March 2, 1899, provides "that no officer or soldier shall be detailed to sell intoxicating drinks, as a bartender or otherwise, in any post exchange or canteen \* \* \*". *Held*, that beer is an intoxicating drink within the meaning of this section. Card 5992, *March, 1899*.

#### SALVAGE.

2291. It is a general principle of law that public property stands on the same footing with private property as regards *salvage*, and upon this principle the goods of the Government are ordinarily held liable to the same rate of salvage as those of individuals, and may be arrested and proceeded against in like manner.<sup>2</sup> But to this rule exceptions have been established. It has been held that the mails cannot be detained for salvage,<sup>3</sup> and it has also been considered that our national ships of war should not be liable to arrest and detention at the suit of salvors, "on account of the injury and inconvenience which might result to the public interests therefrom."<sup>4</sup> This reasoning would appear to be equally applicable to a case of supplies *en route* to armies in the field in time of war. So *held* where certain subsistence and quartermaster stores, in transit to our armies and needed for their use, were detained by the United States marshal at Cairo, Illinois, at the suit of the salvors of a steamer sunk with her cargo (including these supplies) in the Mississippi River. XXI, 241, *February, 1866*.

2292. A citizen of a State within the theatre of the civil war, in order to prevent the capture by the enemy of a steamer belonging to him, caused it to be run up a small stream and concealed. It was,

<sup>1</sup> See *Natl. Bk. v. Co. of Yankton*, 101 U. S. 133.

<sup>2</sup> *United States v. Wihler*, 3 Sumner, 308; *The Merrimac*, 1 Benedict, 201; *The Davis*, 10 Wallace, 15.

<sup>3</sup> *The Schooner Merchant*, 4 A. R. 609; Marvin, *Law of Wreck and Salvage*, § 122.

<sup>4</sup> Marvin, *id.*, *supra*; 2 Parsons' *Maritime Law*, 625.

however, discovered by a partisan force, by which it was dismantled and partly sunk but not held the owner continuing to assert, through an agent who remained with it, his right of property therein. Subsequently it was taken possession of, raised, refitted and used in the war by the Federal military authorities. Upon an application by the owner at the end of the war for its restoration and compensation for its use, *held* that not having been in fact taken from the possession of the enemy it was not subject to a claim for *adversus*, such as that allowed for property recaptured<sup>1</sup> or recovered from pirates;<sup>2</sup> but that the sums expended by the Government in raising and refitting it might properly be offset against the amount claimed for its use. XX, 473, 485, *March, 1866*.

2293. The capture from an enemy of enemy's property, though by civilians, does not entitle the captors to salvage. Thus where a steamer belonging to the enemy, and which had been used by them in the prosecution of the war, was removed from New Orleans just before its occupation by the Federal forces, and concealed in Bayou Jacques where it was found and taken possession of by a detachment of United States troops and military employees, by whom a claim for salvage was thereupon interposed, *held* that such claim was quite without legal sanction, the steamer having become, upon capture, under the provisions of s. 1 of the act of March 12, 1863, c. 120, the property of the United States. XX, 565, *April, 1866*.

#### SECRETARY OF WAR.

2294. It is a fundamental general principle of our public law that all acts done by and directions emanating from the heads of the executive departments in the course of their administrative duties, are in law the acts and directions of the President, in whom is reposed by the Constitution the entire executive power of the Government, and whom the heads of departments (except where specially invested by Congress with distinctive authority of their own) simply act for and represent.<sup>4</sup>

<sup>1</sup> See the *Amelia*, 4 Dallas, 34; *Bas* v. Tingy, *id.* 37; *Talbot* v. Seeman, 1 Cranch, 1; *The Adeline*, 9 *id.* 244; *Marshall* v. Delaware Ins. Co., 2 Wash. c. c., 54 (Fed. cas.), 9, 127.

<sup>2</sup> *Davison* v. Seal-skins, 2 Paine, 324; *Lea* v. The *Alexander*, *id.* 466.

<sup>3</sup> That a Secretary may have special powers devolved upon him, independently of the President, by an act of Congress, see *United States* v. Kendall, 5 Cranch, C. C., 163; Fed. Cas., 15, 517.

<sup>4</sup> *Lockington* v. Smith, Peters C. C., 472; *United States* v. Benner, 1 Baldwin, 238; *Wilcox* v. Jackson, 13 Peters, 498, 513; *United States* v. Blason, 16 *id.* 302; *The Constitution Cases*, 20 Wallace, 109; U. S. v. Fadden, 99 U. S., 10, 19; *Wolsey* v. Chapman, 101 *id.* 755, 769; *Runkle* v. U. S., 122 *id.* 543, 557; *United States* v. Webster, Davis, 38, 59 Fed. Cas., 16, 658; *United States* v. Freeman, 1 Wood, & Minot, 45; *Lockington's Case*, Brightly, 288; *United States* v. Cutter, 2 Curtis, 617; *Hickey* v. Huse, 50 Maine, 495; *McCall's Case*, 3 Philad. 289; *In matter of Spangler*, 11 Mich., 522; 1 Opins. At Gen., 380; 6 *id.*, 326, 587, 682; 7 *id.*, 453, 725; 9 *id.*, 463, 465; 10 *id.*, 527, 11 *id.*, 398; 13 *id.*, 5; 14 *id.*, 153.

Thus all orders made and issued by the Secretary of War in connection with the government and regulation of the military establishment—such as orders convening general courts martial, or approving and directing the execution of the sentences or otherwise acting upon the proceedings of such courts;<sup>1</sup> or mitigating or wholly or partially remitting punishments imposed thereby; or orders summarily dismissing officers, or dropping for desertion, retiring or accepting the resignation of officers; or orders establishing military reservations, or promulgating army regulations, &c.,—are to be regarded as the orders and acts of the President, whom the Secretary of War represents in the administration of his department; the same being presumed to be made and issued with the knowledge and by the direction of the President, whether or not he be referred to therein as having directed or commanded the same; and being equally as valid and operative as if signed by the hand of the President himself.<sup>2</sup> V, 319, *November, 1863*; IX, 44, *May, 1864*; XXIII, 654, *August, 1867*; XXXVII, 650, *June, 1876*; XXXVIII, 107, 243, *June and August, 1876*; XXXIX, 296, *November, 1877*; XLI, 25, *September, 1877*; 611, *July, 1879*; XLII, 209, *March, 1879*; XLI, 111, 106, *December, 1879*.

2296. It is an established rule of our administrative law that a decision upon a claim once arrived at, upon whatever grounds, by the head of a department of the Government, is a finality so far that, in the absence of new evidence, error of calculation, or fraud, it cannot (without the authority of Congress) be re-opened by a successor.<sup>3</sup> LI, 136, *November, 1886*; 53, 443, *May, 1892*; Card 687, *December,*

<sup>1</sup> But see § 337, *ante*, and note.

<sup>2</sup> See *Wilcox v. Jackson*, 13 Peters, 498; *U. S. v. Eliason*, 16 *id.*, 302; *U. S. v. Farden*, 99 *U. S.*, 10, 19; *Wolsey v. Chapman*, 101 *id.*, 755, 769; *Hickey v. Huse*, 56 Maine, 495, 2 Opins. At. Gen., 67; 13 *id.*, 5; 14 *id.*, 453, 15 *id.*, 290, 463; *G. O.* 35, *W. D.*, 1850.

<sup>3</sup> *U. S. v. Bk. of Metropolis*, 15 Peters, 378, *Rollins and Presbrey v. U. S.* 23 *Cl.*, 106, and cases cited; *Waddell's Case*, 25 *id.*, 323, 9 Opins. Atty. Gen., 32; 12 *id.*, 355; 14 *id.*, 275; 15 *id.*, 192, 16 *id.*, 452; 1 *Comp. Dec.* 193; 2 *id.*, 264, 401, 4 *id.*, 305; 6 *id.*, 236, 245. In *Rollins and Presbrey v. U. S.* *supra*, it was held, quoting from syllabus that "any public officer in an executive department may correct his own errors and open, reconsider, or reverse any case decided by himself." In delivering the opinion of the court, Chief Justice Richardson said: "It has long been held in the executive departments that when a claim or controversy between the United States and individuals therein pending has once been fully considered, and final action and determination had thereon by any executive officer having jurisdiction of the same, it can not be reopened, set aside, and a different result ordered by any successor of such officer, except for fraud, manifest error on the face of the proceedings, such as a mathematical miscalculation or newly discovered evidence, presented within a reasonable time and under such circumstances as would be sufficient cause for granting a new trial in a court of law. This ruling and practice of the departments has been approved elsewhere and has been sustained by the courts." (9 Opins. Atty. Gen., 34; 12 *id.*, 172, 258, 14 *id.*, 387, 456, 14 *id.*, 275, 15 *id.*, 401; *Lorah's Case*, 1 *Cl.* R., 147; *Jackson's Case*, 19 *id.*, 564; *State of Illinois's Case*, 20 *id.*, 342, *McKee's Case*, 12 *id.*, 500; *Day's Case*, 21 *id.*, 264, and the opinion of the

1894. *Held* that "new evidence," to be available to change a determination upon a claim arrived at by a previous Secretary of War, must be evidence as to its merits. A mere re-argument, upon a subsequent application, with citation of authorities or precedents, is not such "new evidence," or evidence at all, and cannot avail to reverse the original decision. 58, 110, *February, 1893*. Where an order, fixing the status of an officer on the retired list, was issued by the Secretary of War in the execution of a statute which it was his duty to execute, *held* that such order was *res judicata*, and could not be re-opened or set aside by a succeeding Secretary, in the absence of fraud or manifest error on the face of the proceedings. 41, 358, *June, 1890*.

2296. *Held* that the Secretary of War was not empowered, without the authority of legislation, to re-open the action taken by one of his predecessors upon the proceedings of a court of inquiry in the case of a former officer of the army who had now been twenty years a civilian. 42, 438, *September, 1890*.

2297. The Secretary of War is not authorized, without the authority of Congress, to turn over property of his department, in his charge, to another department for its permanent use and disposition. 51, 414, *January, 1892*. See, also, Card 1623, *August, 1895*. But such transfer may be made with proper debit and credit of appropriations.<sup>1</sup> Cards 3679, *January, 1898*; 7840, *March, 1900*.

2298. It is an established general rule that a head of a department of the Government will not make public or furnish copies of confidential official reports or papers, the disclosure of which will rather prejudice than promote the public interests. In a case of an officer of the army, who, having been dismissed the service by sentence of court martial, applied to be furnished with copies of, or to be allowed to examine, the report of the Judge-Advocate General and the remarks of the General Commanding the Army, in his case,—*advised* that the application be not acceded to by the Secretary of War, the same being no part of the record of trial of the officer but confidential communica-

Judiciary Committee of the Senate, reported by Senator and Judge David Davis, quoted in Jackson's Case (above referred to). But it has never been doubted that any public officer in the departments may correct his own errors, and open, reconsider, and reverse in whole or in part any case decided by himself. As to reopening final settlements, which have been followed by receipt and acceptance by the claimant of the amount awarded, see § 763, *ante*, and note.

The act of July 11, 1894, 28 Stats. 208, provides that "any person accepting payment under a settlement by an auditor shall be thereby precluded from bringing a revision of such settlement as to any items upon which payment has been made." In view of this statute the accounting officers have no jurisdiction to reopen a settlement upon newly discovered evidence, as to any item upon which payment of the amount allowed by an auditor has been accepted. 7 Comp. Dec. decision dated March 15, 1901.

<sup>1</sup>See Para. 616 and 671, A. R., 698 and 753 of 1901, and 3 Comp. Dec. 662.



tions addressed to the President through the Secretary of War. 42, 452, *September, 1890.*

2299. Where, by an act of Congress, the President was "authorized to dispose of" certain reserved lands of the United States, but was not in terms required to execute the transfer, *held* that the execution of the deeds was a ministerial act and that the same might legally be executed by the Secretary of War. 48, 420, *August, 1891.*

2300. *Held* that, in the absence of any statutory authority or appropriation for the purpose, the Secretary of War would not be empowered to issue to the sufferers from wind and hail storms in Lafayette Co., Arkansas, any part of the regular supplies purchased for the support of the army under the annual appropriation act, or to allot for the purpose any part of the public funds appropriated thereby. 60, 473, *July, 1893.*

2301. Sec. 3 of the River and Harbor Act of August 11, 1888, made it the duty of the Secretary of War to apply the money appropriated by the act "in carrying on the various works by contract or otherwise as may be most economical and advantageous to the Government." *Held* that he was thus empowered to authorize the engineer officer in charge of the work for the protection of the levees at New Orleans, to hire, without formal contract, a steambot for transporting material, and for other uses in connection with such work. 40, 95, *March, 1890.*

2302. *Held* that, under the general appropriation in the Army Appropriation Act "for the hire of buildings," the Secretary of War was empowered to rent stables for the use of the army; the existing law precluding the renting of stables for the *civil* establishment not affecting his authority in the matter, and the accounting officers of the Treasury not being warranted in excepting to the wisdom or expedi-

Specific authority for similar purposes has been given by Congress in recent cases— as by act of March 31, 1890, authorizing the Secretary of War to purchase tents for the use of persons driven from their homes by floods in Arkansas, Mississippi and Louisiana and appropriating money therefor, and by joint resolution of April 25, 1890, making an appropriation to be expended by the Secretary of War in the purchase and distribution of subsistence stores for persons suffering from floods of the Mississippi River. And see the joint resolution of Dec. 25, 1893, authorizing certain pecuniary relief to be rendered, in the discretion of the Secretary of War, to the Government employees injured by the Ford's Theatre disaster.

But such assistance has in several instances been given without first obtaining authority from Congress, for example, to the sufferers by storm in Georgia and Florida in 1898, to the Seminole Negro Indians at Fort Clark, Texas, and others in that locality, in June 1899, and in August of that year to the sufferers by tornado in Porto Rico; also to sufferers from the Galveston storm in 1900. And see paragraphs 1440, 1444 and 1446, A. R. (1633, 1638 and 1640 of 1901).

With reference to the Georgia and Florida case, *supra*, see opinion of Acting Attorney General Richards of Oct. 15, 1898, in which it was held that the relief could be extended under the general executive power, there being no statutory prohibition against such an exercise of it.

ency of his orders or acts in the exercise of such authority.<sup>1</sup> 31, 282, April, 1889.

2303. Where the title to a small portion of the land acquired for a military reservation and post was disputed by a private individual, *held* that the Secretary of War had no jurisdiction to pass upon and decide such a question. He could not surrender such portion, even if he believed the claim to be sound, any more than he could surrender the entire reservation, to a claimant who could show evidence of an outstanding title in himself. It is not for the executive officers of the Government to determine whether the United States has a good title, or any title at all, to lands placed under their charge as property of the United States. Such questions are for the courts to decide. 62, 442, and 63, 90, December, 1893.

2304. The act of Congress of Aug. 10, 1890, vested in the Secretary of War a simple authority to purchase land for the purposes of the Chickamauga and Chattanooga National Park, without direction or indication as to the terms of such purchase. Deeds were offered by its owners containing two conditions—1, a condition subsequent to the effect that unless certain improvements should be made the grant should become null and void; 2, a proviso that in case the United States should at any future time condemn other land of the grantor, he should then be paid for the same an amount to be measured by the value, determined by appraisalment, of the lands conveyed by the present deed—an arrangement which would be equivalent to giving him a claim on the United States for an unliquidated amount. *Held* that such conditional conveyances could not legally be accepted by the Secretary of War, no authority being given him by the statute to bind the Government by conditions or stipulations in regard to the title or purchase. 56, 263, November, 1892.

2305. *Held* that an officer who had been improperly paid mileage for travel over a land-grant railroad, in contravention of par. 2417 of

<sup>1</sup> It was held by the Court of Claims in *Billings v. U. S.*, 23 Ct. Cls. 166, that Sec. 191, Revised Statutes, which declares that the balances stated by the accounting officers "shall be conclusive upon the Executive branch of the Government" did not conclude the Secretary of War in the exercise of his legal discretion as to orders issued to his subordinates, that under that section the decision of the accounting officers was conclusive as to the "balances" stated by the accounting officers and their "decision thereon" for the purpose of determining for what amounts, if any, warrants may be drawn on the Treasury, but that when the accounting officers report an officer indebted to the United States, it is a matter wholly within the discretion of the Secretary of War, under Sec. 1706, Revised Statutes, and the Army Regulations, whether to order a stoppage of pay or not. See also, *McKee v. U. S.*, 12 Ct. Cls. 504; *Longwell v. U. S.*, 17 *id.*, 291; *Hartson v. U. S.*, 24 *id.*, 453; 5 Opins. At Gen. 386. The accounting officers of the Treasury have not the burden cast upon them of reversing the action, correcting the supposed mistakes or annulling the orders of the heads of departments. *U. S. v. Jones*, 18 Howard, 496; *U. S. v. Hahn*, 107 U. S. 402; *Brown v. U. S.*, 113 *id.*, 568. See § 198, *note*.

the Army Regulations of 1881—in force at the time,—on his having his pay stopped, could not (as ruled by the Court of Claims in the case of *Billings v. U. S.*, 23 Ct. Cls. 166) have the question of the legality of the stoppage referred to that court by the Secretary of War under Sec. 1063, Rev. Sts. The Secretary might indeed refer such question to the court for his own guidance and action under the act of March 3, 1883, c. 116, s. 2 (the so-called Bowman Act), but the decision of the Secretary thereupon would not bind the accounting officers who would still be authorized to proceed as provided in Secs. 269 (par. 4) and 1766, Rev. Sts. 42, 200, *July 1890*. Where a claim is barred by reason of not having been presented either to the proper department or to the Court of Claims within the six years prescribed by law, the head of that department cannot revive the claim by referring it to the Court of Claims.<sup>1</sup> 42, 69, *July, 1890*.

2306. Under Sec. 1076, Rev. Sts., the Secretary of War (or other head of a department) may refuse or omit to comply with a call of the Court of Claims for information or papers when he considers that it would be prejudicial to the public interests to furnish them; the statute makes him the sole judge on the subject. So *advised* here that a certain affidavit, thus called for, be, on account of the peculiar nature of its contents (as well as its apparent immateriality) withheld. 26, 497, *September, 1888*.

2307. The Secretary of War is authorized to acquire, by purchase or condemnation, land, right of way, or material, needed to maintain, operate or prosecute works for the improvement of rivers and harbors, when provision for the same has been made by law. Card 301, *September, 1894*. But he cannot lease land unless appropriation has been made to pay the rental thereof. Card 195, *August, 1894*. He may permit the use of land under his control by revocable license, or by lease under the act of July 28, 1892. Card 241, *August, 1894*.

#### SENTENCE AND PUNISHMENT—IN GENERAL.<sup>2</sup>

2308. The best approved practice of military courts in determining upon their sentences is believed to be as follows: For each member to write a sentence and deposit it with the judge-advocate; and (no sentence having been adopted by a majority of votes) for the court, after all the sentences have been read to it by the judge-advocate, to proceed to vote upon them in the order of their severity, beginning with

<sup>1</sup> *Dunbar v. U. S.*, 22 Ct. Cls. 109; *Finn v. U. S.*, 123 U. S. 227.

<sup>2</sup> As to particular punishments, see especially NINETY-SIXTH ARTICLE—DISCHARGE—DISMISSAL BY SENTENCE—DISQUALIFICATION—FINE—FORFEITURE BY SENTENCE—IMPRISONMENT—LOSS OF RANK OR FILE—REDUCTION TO THE RANKS—REPRIMAND—SOLITARY CONFINEMENT—SUSPENSION.

the least severe, until some one of those proposed is agreed upon by a majority of votes.<sup>1</sup> It is not *essential*, indeed, that this form of voting should be pursued—it being open to the court, in its discretion, to adopt a different one. XXI, 531, *July, 1866*.

2309. That, upon a conviction by a majority vote of the court, all the members of the court, those who voted for an acquittal equally with those who voted for conviction, must vote for some sentence—though formerly doubted—has long been established as a principle in our military law. While a member who voted for an acquittal cannot of course be *compelled* to vote a punishment, yet his persistent refusal to do so would be a neglect of duty, rendering him amenable to a charge under Art. 62. XXX, 145, *March, 1870*.

2310. Where the Article of War under which the charge is laid is mandatory as to the punishment (as in the cases of Arts. 6, 8, 13, 14, 15, 18, 26, 27, 38, 50, 57, 59, 61, 65), and the sentence imposes, in connection with the mandatory punishment, a further penalty or penalties, this addition to the sentence does not affect its legality so far as relates to the mandatory punishment: as to this it is valid and operative, though as to the rest it is a nullity. IV, 283, *October, 1863*; VII, 296, *April, 1864*.

2311. A punishment, adjudged upon conviction of the accused on several charges, is valid and operative provided it is a punishment legally imposable on conviction of any *one* of the charges of which the accused has been duly convicted.<sup>2</sup> XXV, 104, *September, 1867*.

2312. A sentence, to be valid, must of course rest upon an approved finding of guilty of an offence for which the accused has been tried. Thus a duly approved finding of guilty on *one* of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence although the similar findings on all the other charges are disapproved as not warranted by the testimony. Where such a sentence, though legally supported by the finding upon the single charge, is deemed too severe a punishment for the one offence, it may of course be mitigated by the proper authority. XI, 67, and XII, 30, *October, 1864*; XVI, 70, *April, 1865*. But a finding of guilty of a *specification* to a charge but not guilty of the charge itself will not support a sentence, unless indeed there is added a con-

<sup>1</sup> The practice here referred to is now, of course, modified to conform to the requirements of the act of July 27, 1892, excluding the judges and associate judges from closed sessions. See §§ 1547 and 1548, *infra*.

<sup>2</sup> Thus if upon a conviction upon three charges—of violations of Arts. 38, 61 and 62, respectively—an officer, in connection with dismissal, is sentenced to forfeiture of pay, this punishment, being authorized upon conviction of the third charge, though unauthorized upon conviction of either of the others, will be supported by the conviction on the third charge. See also Carter & McLaughry, 105 Fed. Rep., 614.



viction of some lesser offence included in that charge. VII, 600, *April, 1864*; IX, 19, *May, 1864*. (See § 1359, *ante*.)

2313. In a case where its sentence is discretionary, a court martial may impose any punishment that is sanctioned by usage (the "custom of the service" referred to in Art. 84), although (in cases of soldiers) the same may not be included in the list of the more usual punishments contained in the Army Regulations. IV, 131, 217, *September and October, 1863*; XXII, 555, *January, 1867*; XXIV, 192, 479, *January and April, 1867*. Where for an offence not peculiarly aggravated, a court martial imposed upon a soldier, in connection with a forfeiture of pay for six months, the further penalty of carrying a loaded knapsack weighing twenty-four pounds, every alternate hour from sunrise to sunset of each day (Sundays excepted) during that period, *held* that this punishment was excessive and exceptional, and—the same having been suffered by the soldier for three months—*recommended* that its unexpired term be at once remitted.<sup>1</sup> XXVI, 520, *April, 1868*.

2314. The punishment of ball and chain, though sanctioned by the usage of the service, should, in the opinion of the Judge-Advocate General, be imposed only in extreme cases. Its remission has in general been recommended by him except in cases of old offenders or aggravated crimes, where deemed serviceable as a means of obviating violence or preventing escape. XXVI, 508, 631, 662, 664, *April and July, 1868*; XXVIII, 16, 93, *July and August, 1868*; 501, 532, *April, 1869*. This penalty has (as have also those of shaving the head and drumming out of the service) become rare in our army, and the further corporal punishment of branding or marking has been expressly prohibited by statute.<sup>2</sup> Card 3773, *June, 1898*.

2315. Military duty is honorable, and to impose it in any form as a punishment must tend to degrade it, to the prejudice of the best interests of the service. Thus *advised* that sentences imposing "guard duty" for certain periods should properly be disapproved. IV, 402, *December, 1865*; XXVI, 507, *April, 1868*. So *advised* of a sentence imposing, in connection with a term of confinement in charge of the

<sup>1</sup>Article VIII of the Amendments to the Constitution prohibits the infliction of "cruel and unusual punishments." While this provision does not necessarily govern court-martial inasmuch as they are not a part of the judiciary of the United States (see § 992, *ante*), it should be observed as a general rule. That the provisions of the Vth, Vth, and VIIIth Amendments to the Constitution relating to criminal proceedings, apply only to the courts, &c., of the United States, see *Barron v. Mayor of Baltimore*, 7 Peters, 243; *Ex parte Watkins*, *id.* 573; *Twitchell v. The Commonwealth*, 7 Wallace, 320; *Edwards v. Elliott*, 21 *id.* 557; *Walker v. Sarumet*, 2 Otto, 50; *Pearson v. Yewdall*, 5 *id.* 294; 1 Bish. Cr. L. § 725. See also, "The Supreme Court on the Military Status" by Judge-Adv. Gen. Lieber, 31 Am. Law Rev., 542, and cases cited.

<sup>2</sup>By a provision of the act of June 6, 1872, now incorporated in the 48th Article of War.

guard, the penalty of "sounding all the bugle calls at the post during the same period." XXXVII, 499, *May, 1876*. So advised in regard to a sentence which required a deserter "not for the purpose of making good the time lost by his desertion but as a *punishment*—to serve for an additional year after the expiration of his term of enlistment." XIV, 396, *April, 1865*.

2316. Also *held* that a sentence cannot legally extend the time of the service of a soldier as such beyond the term for which he originally contracted. 40, 110, *March, 1890*. Thus the existing law fixing the term of a soldier's enlistment at five years,<sup>1</sup> a court martial can have no power to prolong it by adding to such term an additional period by way of *punishment*. So a sentence "to make good, at the expiration of his term, a period of fifty seven days during which his services were lost to the United States by being held in hospital on account of pistol wound received by him while in the commission of a disorder in violation of the 62d Article of War," *held* unauthorized and properly disapproved.<sup>2</sup> L, 413, *June, 1886*.

2317. Where, while an officer or soldier is undergoing a certain sentence, he is again brought to trial for a military offence, and a further sentence is adjudged him, imposing a punishment of the same species as that which is being executed, it is the general rule of the service that the second sentence is to be regarded as *cumulative* upon the first, and that its execution is to commence when the execution of the first is completed. This, whether or not the court in the second sentence may have in terms specified that the second punishment should be additional to the first; such second punishment being made cumulative by operation of law irrespective of any direction (and such direction is in fact rarely expressed) in the sentence. XXXVIII, 409, 556, *January and April, 1877*; XLIII, 102, *December, 1879*; Card 1609, *August, 1895*. (See §§ 1479-1481, *ante*.)

2318. While upon the conviction of an officer or soldier under a charge of a crime, such as manslaughter, robbery, larceny, &c., to the prejudice of good order and military discipline, the statute of the United States or State, providing for its punishment as a civil offence, may well be referred to as indicating the nature and extent of the punishment deemed proper for the same by the civil authorities, the punishment to be imposed by the court martial should nevertheless be measured

<sup>1</sup>See—as in accord with the spirit of this paragraph—the following orders: G. O. M. O. 329, War Dept., 1864, G. O. 17, Dept. of the Missouri, 1861, do. 56, Army of the Potomac, 1862; do. 3, Dept. of the Northwest, 1861, do. 49, Middle Dept., 1861.

<sup>2</sup>Now fixed at three years by the act of August 1, 1894.

<sup>3</sup>That the liability to make good time lost by desertion results from a violation of the enlistment contract, that it is independent of any punishment which may be adjudged, and that it need not be adjudged or mentioned in the sentence, see § 64, *ante*.

less by the criminality of the act as a civil offence than by its gravity as a breach of military discipline. Thus where a soldier, having been brought to trial before a civil court for the homicide of another soldier, and inadequately sentenced, was subsequently tried by a general court martial for the military offence involved in his act, *held* that the court would only properly impose upon him a penalty proportioned to the injury done to the good order and discipline of the service, and should not, by an excessive punishment, attempt to compensate for the over-lenient judgment of the civil court. XLI, 188, *April, 1878*.

2319. The word "month" or "months," employed in a sentence, is to be construed as meaning *calendar* month or months; the same significance being given to the term as is now commonly given to it in the construction of American *statutes* in which the word is employed.<sup>1</sup> The old doctrine that "month," in a sentence of court martial, meant *lunar* month, has long since ceased to be accepted in our military law. XXVI, 374, *January, 1868*.

2320. It is a principle of military law that no military authority, whether the reviewing officer or other commander, can *add to a punishment* as imposed by a court martial. Neither forfeiture of pay, for example, nor fine, nor a corporal punishment, can be inflicted upon an officer or soldier where the sentence fails to adjudge it. And neither the fact that the punishment awarded by the court is regarded as an *inadequate* one,<sup>2</sup> nor the fact that the period is a time of *war*, can affect the application of the principle. VIII, 444, 557, *May and June, 1864*; XX, 430, *February, 1866*; XXI, 257, *March, 1866*. Thus, where the punishment imposed by the sentence was to carry a weight of twenty pounds, *held* that it would be illegal for the officer charged with the execution of the sentence to increase the weight to thirty pounds. XXVII, 511, *February, 1869*. So where the sentence imposed simply a forfeiture of pay, *held* that it was adding to the punishment to order it to be executed at a military prison. XI, 98, *November, 1864*; XX, 340, *February, 1866*. So *held* that a sentence of simple "confinement" for a certain time did not authorize the imposition, in connection with its execution, of hard labor.<sup>3</sup> XXI, 310, *April, 1866*. Where an officer, on conviction of the embezzlement of a certain sum, was sentenced, without further penalty, to be dismissed the service, *held* that the department commander, in approving the sentence, could not legally order him to be confined at his station till he should make good the amount embezzled, since this would

<sup>1</sup>See *Moore v. Houston*, 3 Sergt. & Rawle, 184; Sedgwick, *Cons. Stat. & Const.* L, 2d edition, p. 358; also 1 Rev. Stat. of New York § 4. See R. S. N. Y., 1896, Collins, vol. 1, p. 116, § 26.

<sup>2</sup>Compare *Barwis v. Keppel*, 2 Wilson, 314.

<sup>3</sup>See more particularly, as to adding to the punishment in cases of sentences of confinement, §§ 1464-1468, *ante*.

be an adding to the punishment imposed by the court, as well as an illegal exercise of power over a civilian. XXVIII, 122, *September, 1868*.

**2321.** A mitigated sentence can no more be *added to*, in execution, than can an original sentence approved without mitigation. 62, 340, *November, 1893*.

**2322.** A military punishment can legally be imposed only by sentence of court martial after a regular trial and conviction. Such a punishment cannot be imposed by a mere *order*.<sup>1</sup> VI, 105, *May, 1864*; VIII, 341, 505, 620, *April and July, 1864*. Thus a reviewing officer who has disapproved the sentence imposed by a court martial in any case, cannot thereupon order an independent punishment to be suffered by the accused. II, 446, 525, *May and June, 1864*; XI, 310, *December, 1864*. So, such an officer, in disapproving an acquittal, cannot order that the accused be confined or otherwise punished. XII, 249, *January, 1865*. So, a commander, in restoring a deserter to duty without trial according to the Army Regulations, is not authorized to require him to submit to a punishment, as a condition to his being so restored, or otherwise. XVI, 83, *May, 1865*.

<sup>1</sup> We have in our military law no system of summary punishments. Except in a few cases, unimportant in themselves or of rare occurrence in practice (see Arts. 55, 52, 53 and 54), our code recognizes no punishments other than such as may be adjudged upon trial and conviction by a military court. In the general orders punishments inflicted merely at the will of military commanders, have been repeatedly condemned as illegal and forbidden in practice. See G. O. 81 (A. G. O.), 1822, do. 55, Hdqrs. of Army, 1842, do. 2, 4, War Dept., 1843, do. 39, Hdqrs. of Army, 1845, do. 645, War Dept., 1865; do. 49, Northern Dept., 1864; do. 22, Dept. of the Platte, 1867; do. 44, *id.* 1871; do. 63, Dept. of Dakota, 1868; do. 106, *id.* 1871; do. 40, Dept. of the East, 1868; G. C. M. O. 112, *id.* 1870; do. 90, *id.* 1871, G. O. 14, Dept. of the South, 1869, do. 1, 23, 93, *id.* 1873, do. 9, Mil. Div. of the Atlantic, 1869, do. 31, *id.* 1873, do. 23, Dept. of the Lakes, 1870; G. C. M. O. 50, Dept. of the Missouri, 1871. Officers who have resorted to such punishments have been repeatedly brought to trial and sentenced. See G. O. (A. & I. G. O.) of June 30, 1821, do. 8 (A. G. O.), 1826, do. 28, *id.* 1829, do. 44, *id.* 1832, do. 2, 6, 68, War Dept., 1843; do. 39, Hdqrs. of Army, 1845, do. 53, Dept. of Va. & N. C., 1864, do. 22, Dept. of the Platte, 1867, do. 9, Mil. Div. of the Atlantic, 1869; do. 14, Dept. of South, 1869, G. C. M. O. 50, Dept. of the Missouri, 1871. And enlisted men, tried and sentenced for subordinate conduct, where such conduct has been induced or aggravated by illegal corporal punishments inflicted upon them by superiors, have commonly had their sentence remitted or mitigated, or altogether disapproved. See G. O. 40, 76, Northern Dept., 1864, do. 40, Dept. of the East, 1868, G. C. M. O. 90, *id.* 1871; G. O. 63, Dept. of Dakota, 1868; do. 76, *id.* 1871, G. C. M. O. 45, *id.* 1880, do. 93, Dept. of the South, 1873. In proper cases of course, as where violence is employed, escape attempted, &c., by soldiers who are mutinous or disorderly, or in arrest under charges, force may be used against them according to the necessities of the case. See § 1636, *note*; also G. O. 53, Hdqrs. of Army, 1842; do. 2, War Dept., 1843, G. C. M. O. 47, Hdqrs. of Army, 1877; G. O. 53, Dept. of Va. & N. C., 1864, do. 40, Dept. of the East, 1868, G. C. M. O. 112, *id.* 1870, do. 90, *id.* 1871, G. O. 23, Dept. of the Lakes, 1870; do. 106, Dept. of Dakota, 1871, do. 93, Dept. of the South, 1873, do. 31, Mil. Div. of the Atlantic, 1873, G. C. M. O. 37, Dept. of Texas, 1880. This, however, is *protection and restraint*, not *punishment*; the authority to use the useful force in such cases will not justify the superior, when the offender is repressed or apprehended, in subjecting him to arbitrary punitive treatment. See §§ 1492-1495, *note*.



**2323.** A legal sentence of court martial, when once duly approved and executed, cannot be reached by a pardon, nor revoked, recalled, modified or replaced by a milder punishment or other proceeding, either by the Executive or by Congress.<sup>1</sup> The only remedy for a party who has suffered injustice from such a sentence is either a new appointment to the army by the President or some legislation within the province of Congress<sup>2</sup> relieving or indemnifying him for and on account thereof. *XLI, 538, April, 1879; XLII, 320, June, 1879; LIII, 143, October, 1886; Cards 4494, June, 1898; 6590, June, 1899.*

**2324.** Where a sentence in excess of the legal limit is divisible, such part as is legal may be approved and executed. Thus where a sentence of an inferior court imposes a fine or forfeiture beyond the limit of the 83d Article of War, the sentence may be approved and executed as to so much as is within the limit.<sup>3</sup> *55, 349, September, 1892; 59, 27, April, 1893; Card 439, October, 1894.*

**2325.** The rule prescribed in pars. 1025 and 1032, A. R. (944 and 951 of 1895),<sup>4</sup> to the effect that confinement and forfeiture, when the sentence is silent as to the time of their taking effect, shall be operative from the date of the promulgation of the sentence in orders, is an exception to the general rule that orders affecting the status or rights of officers or soldiers shall take effect from notice. But where a sentence of dismissal of a cadet of the Military Academy was on October 31, 1893, commuted to suspension from the academy without pay until Aug. 28, 1894, *held* that the general rule, in the absence of any specific exception of such a case by the Army Regulations, applied, and that the sentence as commuted took effect upon and from notice, the forfeiture commencing to run from its date. *64, 280, April, 1894.*

**2326.** The suspension of the sentence of a court martial before or pending its execution is a procedure without precedent in our military service. *Card 8838, August, 1900.*

#### SENTINEL.

**2327.** Respect for the person and office of a sentinel is as strictly enjoined by military law as that required to be paid to an officer. As it is expressed in the Army Regulations "all persons of whatever rank in the service are required to observe respect toward sentinels." Invested, as the private soldier frequently is while on his post, with a grave responsibility, it is proper that he should be fully protected in

<sup>1</sup>The well established principles that mere irregularities in the proceedings will not affect the validity of an executed sentence, and that a legal sentence once duly confirmed and executed is "no longer subject to review by the President," so pointedly set forth in 1843 in 4 Opms. 274, are further illustrated in 15 *id.* 290, 432.

<sup>2</sup>See §§ 1129, 1200, 1394, 1869, 2041, and 2235, *ante*.

<sup>3</sup>See Circ. No. 12, A. G. O. 1892.

<sup>4</sup>Paragraphs 1045 and 1052 of 1901.

the discharge of his duty. To permit any one, of whatever rank, to molest or interfere with him while thus employed, without becoming liable to a severe penalty, would obviously establish a precedent highly prejudicial to the interests of the service. So where, in time of war, a lieutenant ordered a soldier of his regiment, who had been placed on duty as a sentry by superior authority, to feed and take care of his horse, and, upon the latter respectfully declining to leave his post for the purpose, assailed him with abusive language—*held* that a sentence of dismissal imposed by a court martial upon such officer, on his conviction of this offence, was fully justified by the requirements of military discipline. XVIII, 528, *February, 1866*.

#### SOLDIERS' HOME.

2328. Sec. 4824, Rev. Sts., subjecting the inmates of the Soldiers' Home to the Rules and Articles of War, is unconstitutional and a dead letter. These inmates are no part of the army, nor are they supported by the United States. They are civilians occupying dwellings and sustained by funds held in trust for them. The territory of the home being within the District of Columbia, and not having been exempted by Congress from the operation of the criminal laws of the District, the inmates are subject to those laws like any other residents.<sup>1</sup> 55, 406, *September, 1892*.

2329. An inmate is not required to remain at the home if he wishes to leave it. The privileges of the institution may be renounced by any act showing an intention to renounce them—such as direct notice of such intention, or by absenting himself with the evident purpose of not returning. In February, 1864, a certain inmate was transferred from the home to the Government Insane Hospital, and was discharged thence as sane in June, 1864. He did not return to the home and was not again heard of till March, 1886, when it was ascertained that he was at the State Insane Hospital of Pennsylvania. As he was sane when he left the government hospital and did not return to the home within a reasonable time, but remained absent nearly twenty-two years, *held* that he must be deemed, in the absence of contrary evidence, to have intended to permanently separate himself from the institution, and that he therefore was not now an inmate or member of the same. L. 167, *April, 1886*.

2330. Contracts for the home should be entered into, not by the "Soldiers' Home," which is not an incorporated institution, but by the Board of Commissioners, who, as representing the United States in the management of the home, may authorize contracts which will bind the United States. 58, 137, *February, 1893*.

<sup>1</sup> Compare opinion of Atty. Gen. in 20 Opins. 514.

**2331.** The funds for the support of the Soldiers' Home are not of the class of public moneys annually appropriated for a specific object, as for the pay of the army, but a special trust fund committed to and administered by the Board of Commissioners for the benefit of the institution. From an early period in the history of the home it has been the usage for the commissioners to permit the officers of the home (retired officers of the army residing thereat), gratuitously to receive and use a reasonable portion of the ordinary supplies of fuel, light, forage, milk, ice and vegetables, either produced at the home or obtained for its consumption. *Held* that such allowance was not in contravention of law; that the articles thus issued are not of the class of military pay and emoluments, and therefore unauthorized because not allowed by law to retired officers, but are a reasonable share of the supplies for the use and benefit of the home, the disposition of which is properly within the discretion of the commissioners as charged by law with the "government and interests" of the home. And similarly *held* in regard to the amount of \$1,000, allowed annually out of such funds to the treasurer of the home, as a compensation for his special services and in consideration of his pecuniary responsibility as a bonded officer.' **51**, 296, *January, 1892*.

**2332.** *Held* that a medical officer of the army, occupying quarters at the Soldiers' Home, was not thereby precluded from receiving commutation of quarters at New York, on being ordered to duty there as a member of a medical examining board. The quarters occupied by him at the home are not "public quarters" in the sense of par. 1480, A. R.: he does not occupy them at the expense of the United States; and by allowing him the commutation, the Government is not put to a double expense for his quarters. **56**, 174, *October, 1892*.

**2333.** Sec. 4818, Rev. Sts., appropriates as one of the funds for the support of the Soldiers' Home—"all forfeitures on account of desertion". *Held* that this appropriation included the *retained pay* of soldiers, as forfeited by desertion under the provisions of Secs. 1281 and 1282, Rev. Sts., and of the act of June 16, 1890, c. 426, s. 1. The retained pay is merely a fraction of the monthly pay of the soldier, earned with the rest of his monthly pay, as a part of the entire consideration for service rendered, but of which the payment—the right to receive—is deferred. The theory that it is not to be regarded as earned till the soldier's service is concluded and he receives an honorable discharge, is rebutted by the statutory provisions above cited, and especially by the provision of the act of 1890, which treats the retained pay as pay constantly accruing and as a continuing *deposit* for the use of the sol-

<sup>1</sup> See opinion of Attorney General to same effect, in 20 Opins. 350.

dier drawing interest from the end of each year in which it accrues. The ruling of the Supreme Court in *U. S. v. Landers* (92 U. S. 77) is not opposed to this view, but, as construed by the same court in *U. S. v. Kingsley* (138 U. S. 87) shows that the "forfeiture" referred to in Secs. 1281 and 1282, Rev. Sts., was regarded by the court as meaning a loss of an *acquired* right. And the act of 1890, passed since this ruling, has confirmed this interpretation. Thus a soldier, in deserting, forfeits, with the main portion of his pay, the portion which has been *retained*, his right to this lesser portion being as much acquired and perfected as his right to the greater portion. Both forfeitures rest upon the same basis, and the aggregate forfeiture of both is appropriated by the statute to the support of the Soldiers' Home. 60, 13, *June, 1893*; 61, 486, *October, 1893*.

2334. A stoppage of twelve dollars was made against a soldier on account of the loss of a revolver. Subsequently he was tried for pawning the revolver and for desertion, and sentenced to dishonorable discharge, forfeiture of all pay and allowances and confinement for three years. Later the revolver was recovered. *Held*, that the stoppage should be removed but that it would go to the Soldiers' Home as a forfeiture under the sentence and could not therefore be returned to the man. Card 1500, *July, 1895*.

2335. There is no law expressly relating to the subject but the Secretary of War in the exercise of his general power over the movements of members of the army, may order a hospital attendant, an enlisted man, to accompany an invalid discharged soldier to the Soldiers' Home. Card 2592, *September, 1896*.

2336. Section 4745, Revised Statutes, should not be construed as prohibiting the practice by which transportation to the Soldiers' Home is furnished by it to a needy discharged soldier, with the understanding that the home will repay itself out of his pension when collected. This is not a pledge, etc., of his pension by a discharged soldier within the meaning of Sec. 4745, but a repayment by a governmental agency to itself out of money belonging to him and placed in his hands by law, of money advanced by it to him solely for his interest. Card 5922, *February, 1899*.

2337. The law of the United States for the District of Columbia is to the effect that where a person dies intestate, leaving an estate in the District and there is no relation of the intestate within the fifth degree, the estate shall belong to the United States. Under this law, whenever an inmate has died in the Soldiers' Home, at Washington, D. C., leaving money in bank in that city, or other moneys or personal effects, in the District, the same become the property of the United States; and all such property and effects other than money



should (by the proper proceedings in court) be converted into money, and then this, together with the money left by the soldier in bank or elsewhere in the District, should be turned into the United States Treasury by order of court, as money of estates escheated to the United States. Section 3689 of the United States Revised Statutes appropriates for the Soldiers' Home "*out of any moneys in the Treasury, \* \* \* all moneys belonging to the estates of deceased soldiers*". After, therefore, the moneys and the proceeds of the other effects of inmates of the home, have been paid by order of court into the United States Treasury as moneys of escheated estates, the Soldiers' Home is entitled to receive the same from the Treasury. The home is not however entitled to it until it shall have gone into the Treasury so that section 3689 can apply to and appropriate it to the use of the home. It is not the duty and probably not within the power of the Soldiers' Home to move in the matter of enforcing the law with regard to the moneys or property of any estate, whether the decedents were inmates of the home or not. But as it is the duty of the Attorney General of the United States (through the United States attorney of this district) to look after and collect all moneys and property the United States is entitled to under the law, whether the decedents are inmates of the home or whether they are civilians who reside elsewhere in the District, *Advised* that he be informed by the proper officials of the home of the death of all inmates who leave any money or property in the district and the whereabouts of the same, which it may be in his power to collect and turn into the Treasury as above indicated. Money so turned in should be obtained by the home by direct application to the Treasury for the same. Card 3493, *September, 1897*.

**2338.** On the questions, (1), whether the Board of Commissioners of the Soldiers' Home has authority to establish a branch home; (2), whether the Secretary of War has legal authority to grant to the Soldiers' Home the right to locate a branch of the home on a military reservation and to occupy buildings erected for the military establishment; and (3), whether, if such right were granted, the board of commissioners would have authority to expend funds of the Soldiers' Home in keeping such buildings in repair—*held*, first, that it was the intention of the original legislation relating to the Soldiers' Home to establish it at one or more places, and no subsequent legislation has interfered with this, except as to one locality, and that under the legislation as it now stands it would not be illegal to establish a branch; second, that the Secretary of War has no authority independently of congress to grant away any interests in buildings erected on military reservations, but that he may do so under legislation of July 28, 1892

(27 Stats., 321), which vests him with authority, "when in his discretion it will be for the public good, to lease for a period not exceeding five years, and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law"; and third, that if the Soldiers' Home may thus lease buildings on a military reservation, to be used as a branch, the expenditure of funds of the home in keeping the buildings in a condition fitting them for this purpose would be a legal expenditure notwithstanding that the home could not, on the termination of the lease, recover any money so expended. Card 6818, *July, 1899*.

#### SOLDIERS' HOME—STATE.

2339. By act of Congress, approved Aug. 27, 1888 (25 Stats., 450) it is provided: "That all States and Territories which have established, or which shall hereafter establish, State homes for disabled soldiers and sailors of the United States who served in the war of the Rebellion, or in any previous war, who are disabled by age, disease or otherwise, and by reason of such disability are incapable of earning a living, provided such disability was not incurred in service against the United States, shall be paid for every such disabled soldier or sailor who may be admitted and cared for in such home at the rate of one hundred dollars per annum." Under this statute and the current appropriation (28 Stats., 955), the State or Territory establishing a home is to be paid for caring for the persons designated, and the United States is not concerned with the application of the moneys so paid. Aside from verifying the number of inmates cared for, the general government makes no inspections of or exercises any supervision over such State or Territorial home. Card 2222, *April, 1898*.

2340. The act of Aug. 27, 1888 (25 Stats., 450), further prescribes that the number of persons for whose care the State or Territory shall receive payment "shall be ascertained by the Board of Managers of the National Home for Disabled Volunteer Soldiers, under such regulations as it may prescribe," and the board has adopted a regulation recognizing the right of the States to payment for insane members cared for in insane asylums. *Ibid*, that such regulation is legal and proper. The word "home," as used in the statute, should not be narrowly construed. The insane man is still a member of the home and taken care of in it, within the meaning of the statute, when he is sent to and kept at an asylum at the expense of the home. There is a marked difference between the case of such insane inmate and that of an inmate who voluntarily leaves the institution to live with others. The latter abandons his right to the care of the home, while the former simply continues under its care. Card 3121, *April, 1897*.

## SOLDIERS' HOME—NATIONAL VOLUNTEER.

**2341.** The act of March 3, 1891, c. 542, provides that "the accounts relating to the expenditure of such sums" (appropriated for the support of the National Volunteer Home), "as also all receipts by said home from whatever source, shall, in addition to the supervision now provided for, be reported to and supervised by the Secretary of War." *Held*, that this provision called for an examination of the accounts by the Secretary, with a view to the correction of errors or unauthorized uses of the funds, and a formal approval in case none such were discovered; also that by the term "receipts" were included receipts not only from outside but from interior sources—as from the sale of flowers and provisions—so long as such continued to accrue. 51, 104, *December, 1891*.

**2342.** By the act of March 3, 1893, c. 210, it is provided that "the Secretary of War shall hereafter exercise the same supervision over all receipts and disbursements on account of the volunteer soldiers' homes as he is required by law to apply to the accounts of disbursing officers of the army." *Held*, that the supervision here indicated should be analogous to that prescribed by the act of April 20, 1874, c. 117, entitled "an act to provide for the inspection of the disbursements of appropriations made by officers of the army," and should be regulated by the provisions of titles LVIII and LXXII of the Army Regulations, so far as applicable. 58, 484, *April, 1893*.

**2343.** *Held*, later, that certain projected legislation, proposing to vest in the Secretary of War, a *general supervision*, that is to say, superintendence, direction and control, of all the affairs of the national volunteer homes, would be in direct conflict with the existing provision of Sec. 4825, Rev. Sts., fixing and defining the corporate powers of "The National Home for Disabled Volunteer Soldiers"; and that, if such legislation be adopted, it should properly provide for a repeal of so much of this section as gives the corporation control of its affairs. It may indeed well be questioned whether the recent provision of March 3, 1893, c. 210, giving the Secretary of War "supervision over all receipts and disbursements on account of the volunteer soldiers' homes," does not vest him with an authority greater than is consistent with the said corporate powers. 63, 61, *December, 1893*.

**2344.** Sec. 4835, Rev. Sts., providing that the inmates of the "National Home for Disabled Volunteer Soldiers" shall be "subject to the rules and Articles of War," *held*, to be clearly an unconstitutional enactment, such inmates not being any part of the armies of the United States, but *civilians*. The fact that they had once been members of the volunteer forces could not attach to them, after their final discharges, any amenability to the military jurisdiction.<sup>1</sup> XXX, 286, *April, 1870*.

<sup>1</sup>See § 1038, *ante*, and note, also as to jurisdiction of courts martial over civilians, § 1031, *ante*, and note.

### SOLITARY CONFINEMENT.

**2345.** *Held* that a sentence of two months' confinement, which prescribed that the confinement for two days out of every three should be solitary, was unauthorized as transcending the proportion fixed by the Army Regulations; such sentence in fact requiring that the confinement should be solitary for forty days out of sixty, while the regulations authorize but *eighty-four* days of solitary confinement in an entire year. XXVIII, 329, *January, 1869.*

### SPY.

**2346.** See, 1343, Rev. Sts.,<sup>1</sup> is one of the few provisions of our statute law authorizing the trial, in time of war, of *civilians*, by military courts. The majority, however, of the persons brought to trial as spies during the civil war were members of the army of the enemy. The gravamen of the offence of the spy is the treachery or deception practised—the being in disguise or acting under false pretences.<sup>2</sup> An officer or soldier of the enemy discovered “lurking” in or near a camp or post of our army, disguised in the uniform or overcoat of a U. S. soldier, is *prima facie* a spy, and liable to trial as such. XIV, 579, *June, 1865.* So an officer or soldier of the enemy who without authority and covertly penetrates within our lines disguised in the dress of a civilian, may ordinarily be presumed to have come in the character of a spy, unless, by satisfactory evidence that he came for some comparatively venial purpose, as to visit his family, and not for the purpose of obtaining information, he may rebut the presumption against him and show that his offence was a simple violation of the laws of war. II, 580, *June, 1863*; IV, 307, and V, 315, *November, 1863*; V, 572, and VII, 66, *January, 1864.*

**2347.** Where an officer of the enemy's army, arrested while lurking in the State of New York in the disguise of a citizen's dress, was shown to have been in the habit of passing, for hostile purposes, to and from Canada, where he held communication with agents of the enemy, and conveyed intelligence to them—*held* that he was amenable to trial as a spy before a military court under the statute. XI, 474, *February, 1865.*

**2348.** An officer of the enemy's army, having come secretly within our lines, proceeded from Baltimore through a part of the country

<sup>1</sup> This section provides: “All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.”

<sup>2</sup> Halleck, Int. Law, 406-7.



containing numerous military posts, &c., to Detroit, where he entered Canada, communicated with the enemy's agents there and received from them letters to be conveyed to Richmond. On his return, while travelling under an assumed name and disguised by citizen's dress and an artificial coloring of the hair, he was recognized and arrested, and upon his arrest destroyed at once his papers. *Held* that he might properly be brought to trial, and his offence investigated under a charge of being a spy; and that his claim that he was merely a bearer of official dispatches was entitled to but slight consideration, in view of the fact that he had taken the first opportunity to destroy the evidence on which such claim was based. XV, 14, *February, 1865*.

2349. Where a soldier of the enemy's army, separated from it on its retreat from Maryland in 1864, was arrested after wandering about in disguise within our lines for a month, seeking for an opportunity to make his way to the enemy's forces and join his regiment, *held* that he was not properly chargeable with the offence of the spy but should, because of his disguise, be punished for a violation of the laws of war. XI, 82, *October, 1864*.

2350. A mere violation of the law of war prohibiting intercourse between belligerents, committed by a civilian in coming without authority within our lines from the enemy's country, cannot properly be regarded as attaching to him the character of the spy. IX, 85, *May, 1864*.

2351. The spy must be taken *in flagrante delicto*. If he succeeds in making his return to his own army or country, the crime, according to a well settled principle of public law, does not follow him, and, if subsequently captured in battle or otherwise, he cannot properly be brought to trial as a spy. V, 248, 286, *November, 1863*; IX, 100, *May, 1864*; XXIII, 459, *May, 1867*; Card 2644, *September, 1896*.

## STATEMENT OF ACCUSED.

2352. In any case tried by court martial the accused may, if he thinks proper (and whether or not he has taken the stand as a witness<sup>1</sup>), present to the court a statement or address either verbal or in writing. Such statement is not *evidence*:<sup>2</sup> as a personal defence or argument, however, it may and properly should be taken into consideration by the court. XX, 432, *February, 1866*.

2353. While the statement is not evidence, and the accused is not in

<sup>1</sup> The leading case on this point in this country is, In the matter of Martin, reported in 45 Barb. (N. Y.), 142, and 31 How. Pr. 228. See also par 104, G. O. 100, A. G. O. of 1863.

<sup>2</sup> See G. C. M. C. 3, Dept. of the Missouri, 1860.

<sup>3</sup> That a sworn statement cannot be made to serve as the testimony of the accused as a witness under the act of March 16, 1878, see note to § 2461, *post*.

general to be held bound by the argumentative declarations contained in the same, yet, if he clearly and unequivocally admits therein *facts* material to the prosecution, such may properly be viewed by the court and reviewing officer as practically facts in the case.<sup>1</sup> XXVII, 407, *December, 1868*. So, where the accused, in his statement, fully admits that certain facts existed substantially as proved, he may be regarded as waiving objection to any irregularity in the form of the proof of the same. XXVII, 385, *November, 1868*.

2354. A large freedom of expression in his statement to the court is allowable to an accused, especially in his comments upon the evidence. So, an accused may be permitted to reflect within reasonable limits upon the apparent *animus* of his accuser or prosecutor, though a superior officer and of high rank. But an attack upon such a superior, of a *personal* character and not apposite to the facts of the case, is not legitimate; nor is language of marked disrespect employed toward the court. Matter of this description may indeed be required by the court to be omitted by the accused as a condition to his continuing his address or filing it with the record. XXVII, 520, *February, 1869*.

2355. It is settled in our military procedure that the *closing* statement or argument, where addresses are presented on both sides, shall be made on the part of the prosecution. The judge-advocate, however, may, and, in practice, not rarely does, waive the right of offering any argument or remarks in reply to the address of the accused. On the other hand, the accused may waive the right, and the judge-advocate alone present a "statement." XI, 377, *January, 1865*.

2356. The *publication* by an officer, after his acquittal, of the statement presented by him to the court on his trial, in which he reflected in violent and vituperative language upon the motive and conduct of an officer of the same regiment, his accuser, and denounced him as devoid of the instincts of a gentleman and a disgrace to the service, — held to constitute a serious military offence, to the prejudice of good order and military discipline, if not indeed a violation of Art. 61; and further that it was no defence to such a publication that the court on the trial had permitted the statement to be made and recorded. XXXIII, 582, *December, 1872*; XXXIV, 106, *March, 1873*.

#### STATUTE—CONSTRUCTION OF.

2357. In applying the Articles of War to particular cases, a case should not be treated as within the penal provisions of an article unless

<sup>1</sup> That a fact clearly admitted or assumed in the course of a trial may be considered as much in the case as if it had been expressly proved, see *Page v. Frazier*, 36 Barb. (N. Y.), 392.

it is quite clearly included by the words of description employed. XXXVIII, 199, *July, 1876*.

2359. It is well settled that the word "may," in a statute conferring power upon a public officer, is to be construed as equivalent to "must" or "shall," where the enactment imposes a public duty, or makes provision for the benefit of individuals whose rights cannot be effectuated without the exercise of the power.<sup>1</sup> So where the Secretary of War was "authorized" by an act of Congress to reopen a settlement previously made with a railroad company for government transportation, &c., adjust the same upon a certain stated basis, and issue his warrant on the Treasury for such amount as might be found due the company on such re-adjustment, *held* that the statute did not confer a mere discretionary authority but was mandatory upon the Secretary.<sup>2</sup> XLII, 328, *June, 1879*.

2359. The proper construction of appropriation acts providing that a certain sum or so much of it as may be necessary, *may* be expended on a certain work for the benefit of the public is in general, if there be no modifying clause, that it was the intention of Congress that so much of the appropriation as may be necessary for the work shall be expended on it. In such cases it cannot be presumed merely from the use of the word "may" in the acts that it was the intention to vest the one whose duty it is to expend the appropriation, with a discretion to do or not to do the work appropriated for. The word *may* have such a meaning but it is not to be inferred from the word alone when used in acts of this character. Card 2473, *July, 1898*.

2360. While there is a distinction between a statute in which a public official is "authorized," and one in which he is "required" or "directed," to perform a certain act, in that a discretion is in general conferred by a statute of the former class; yet where the Secretary of War was authorized by an act of Congress to sell a portion of a military reservation "at such times as he may deem most advantageous to the interests of the Government, and in such manner as hereinafter provided," and further provision was made in the act in regard to the laying out of a part of the land in lots before sale, and as to the mode of sale and the notice to be given of the same, *held* that it was evidently contemplated by Congress that the sale should be made at some time — a public duty being thus far imposed, and accordingly that the Secre-

<sup>1</sup>See *Minor v. Mechs. Bk.*, 1 Peters, 46; *Supervisors v. United States*, 4 Wallace, 435, and cases cited; also *Fowler v. Perkins*, 77 Ill. 271; *Kans. P. R. R. Co. v. Keynolds*, 8 Kans. 628; *People v. Owners of Buffalo Co.*, 4 Neb. 150.

On the other hand, see § 87, *ante*, for an instance in which "shall" in a statute is interpreted as meaning *may*.

<sup>2</sup>See concurring opinion of the Solicitor General in 15 Opms. At. Gen. 621; also *Supervisors v. United States*, 4 Wallace, 435.

tary could not properly omit to proceed with such sale for any considerable period, unless it was found to be clearly for the public interests to postpone the same. XXVII, 525, *February, 1869*.

2361. *Held* that the remarks of members of Congress in a debate on a bill, as to the purpose of the proposed measure, the reasons for adopting the same, &c., did not ordinarily constitute a safe basis for the accurate construction of the same after it had become enacted.<sup>1</sup> XXXVII, 656, *June, 1876*.

2362. Where a statute clearly requires a thing to be done in a particular mode and form, the same cannot legally be varied from in material details by the officer charged with the performance.<sup>2</sup> Thus, where Congress appropriated certain funds for a bridge, which, it was expressly specified in the act, was to be erected according to a certain designated plan which had been recommended for the purpose by the Chief of Ordnance,—*held* that the construction of the bridge in accordance with such a plan was a condition to the due expenditure of the money appropriated, and that the plan could not legally be departed from in the construction.<sup>3</sup> XXVIII, 664, *June, 1869*.

2363. An act of Feb. 23, 1892, "authorized" the President to issue to an officer of the army a commission of a date prior to his existing commission. *Held* that this was a case where, because of the individual right involved, the language of the statute, though in form permissive, should be construed to be mandatory.<sup>4</sup> 58, 300, *March, 1893*.

<sup>1</sup> "In expounding a law, the judgment of the court cannot be influenced in any degree by the construction placed upon it, of individual members of Congress, in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered." Taney, C. J., in *Aldridge v. Williams*, 3 Howard, 24. So, in *Lockington's Case* Brightly, 289, it was held by the Supreme Court of Pennsylvania, per Yeates, J., as follows: "I regard the true meaning of the law, to be collected *ex conversationibus*, as the only correct ground of decision thereon. It is of no moment, in my idea, how it was treated by different gentlemen on the floor of Congress." And see *United States v. Union P. R. R. Co.*, 1 Otto, 79; *Leese v. Clark*, 20 Cal. 388; *Keyport, &c., Co. v. Farmers, &c., Co.*, 18 N. Jersey Eq. 13; 13 Opins. At. Gen. 368. But it is said by Mr. Justice Field, in *Ho Ah Kow v. Numan*, 5 Sawyer, 560, that while "statements in debate cannot be resorted to for the purpose of explaining the meaning of the terms used," the same "can be resorted to for the purpose of ascertaining the general object of the legislation proposed and the mischief sought to be remedied."

In an opinion of Aug. 23, 1879 (16 Opins. 378), the Attorney General remarks that the construction of a statute, when doubtful, may be aided by a reference to the debate when the members concurred as to the purpose of the measure, but scarcely so when they expressed different views on the subject. In an earlier opinion (15 Opins. 625), the Solicitor General, in referring to the general rule (as held in the text), cites the case of *Bank of Pa. v. Commonwealth*, 19 Pa. St. 156, to the effect that "it is delusive and dangerous to admit messages of governors, journals of the legislature, or reports of committees, to aid in construing statutes."

<sup>2</sup> See *Commissioners v. Gaines*, 3 Brev. 396.

<sup>3</sup> See concurring opinion of the Attorney General in 13 Opins. 78; also, later opinion in 20 Opins. 653.

<sup>4</sup> *Supervisors v. United States*, 4 Wallace, 435; *Endlich on the Interpretation of Statutes*, § 309.



And similarly *held* as to the effect of the word "authorized" in Sec. 224, Rev. Sts., authorizing the Secretary of War, in case of the loss of a soldier's discharge, to issue to him a duplicate. 36, 409, *November, 1889*.

2364. In an act of Sept. 26, 1890, authorizing a railroad company to bridge certain navigable waters, it was provided that the authority should cease and be inoperative if after the expiration of two years the work was not commenced. The work was not in fact commenced within the period limited, but on February 28, 1893, after such period had elapsed, a further act was passed, which, without re-enacting the former act, simply extended the time within which the construction might be commenced and completed. *Held* that such act had the effect of reviving the former act. 59, 21, *April, 1893*.

2365. The Army Appropriation Act of Sept. 22, 1888, and the subsequent similar acts, provide that, "after advertisement," army supplies "shall be purchased where the same can be purchased the cheapest, quality and cost of transportation considered." *Held* that this provision did not repeal that of Sec. 3716, Rev. Sts., to the effect that in advertisements preferences should be given to certain articles; the later enactments relating to purchasing only and the earlier to the form of advertisement before purchase. 60, 130, *June, 1892*.

2366. It is a uniform principle in the construction of statutes which do not expressly prescribe a different rule—that where time is to be computed from an act done, the day on which the act is done shall be excluded.<sup>1</sup> Card 1084, *March, 1895*.

#### STATUTE OR BILL FOR RESTORATION, &c., OF DISMISSED OFFICERS.<sup>2</sup>

2367. Upon a bill by which it was proposed to restore a dismissed officer to the army by declaring his "record amended so that he should appear to have been continuously in service,"—*remarked* that such bill was not in a usual or proper form for effecting the object designed; that the obliteration of the record of an officer's dismissal on the books or rolls of the War Department would be wholly inoperative *per se* to reinstate the officer; moreover that the legislative department of the government was without authority to restore such an officer to the army but could only authorize his restoration by the appointing power.<sup>3</sup> XXXVI, 216, *July, 1875*.

<sup>1</sup> See 9 Opins. At Gen 131.

<sup>2</sup> Since the opinions under this head were rendered, the kind of legislation pointed out as objectionable has been resorted to with increasing frequency.

<sup>3</sup> There was subsequently substituted for this bill one authorizing the appointment of the officer in the usual manner, which became a law. But see, in this connection, the opinion of the Attorney General in a similar case in 14 Opins. 418.

2368. Upon a bill to authorize the Secretary of War to give an "honorable discharge" to a dismissed officer, as of the date of the order of the President approving the dismissal, — *remarked* that as this officer had, by his dismissal, been completely separated from the army and had become a civilian, he could not be *discharged* from the army without being readmitted to it, and that he could not be so readmitted without a new appointment (see § 1200, *ante*); further that while the bill might possibly be construed as authorizing the Executive to reappoint the officer, such construction would be a forced and unnatural one — the bill, as it stood, being really repugnant to the provisions of the Constitution in regard to appointments, — and that it would therefore be preferable that the bill should be so amended as simply and directly to authorize the appointment of the officer according to the approved precedents of legislation in such cases. XXXVIII, 59, *January, 1876*.

2369. Upon a bill in which the "Secretary of War" was authorized and directed to restore a dismissed officer to the rank of captain as of the date of his dismissal, — *remarked* that while such bill, if enacted, might, in order to give it a legal effect, probably be deemed sufficient to confer upon the Secretary as the head of a department an authority to exercise the appointing power, yet that the same was *in terms* inadmissible and tended to establish a bad precedent, and would therefore preferably be amended, so as to conform to the usual and proper course of legislation in such cases.<sup>1</sup> XXXVIII, 61, *January, 1876*.

2370. Where an act of Congress authorized the President "to restore" a person, described as late a paymaster of the army, "to the Army Register, for the purpose of being placed on the retired list," — *held* that this enactment, though inaptly expressed, might properly be construed as intending to exercise the power conferred upon Congress by Art. II, Sec. 2, par. 2, of the Constitution of "vesting in the President alone" the appointment of an "inferior" officer; and therefore that a simple appointment by the President of this officer, without any nomination to or confirmation by the Senate (followed by his retirement by the President with the rank of major), would be a legal and constitutional exercise of authority, constituting as valid and effectual an appointment and reinstatement as if the officer's name had been, in the first instance, sent to the Senate and favorably acted upon, and a commission had thereupon been issued to him. XLII, 178, *February, 1879*. And similarly *held* in a case in which, by act of Congress, the President was "authorized to reinstate" a "major, late of the United

<sup>1</sup> This bill did not become law, but there was subsequently passed an act authorizing the President, in his discretion, to appoint the officer, with the concurrence of the Senate.

States army, and to retire him in that grade as of the date he was previously mustered out"; and *remarked* that such construction was especially justified in a case like the present, where—as gathered from the reports of the committees of the two Houses, upon the recommendation of which the act was passed—the evident intent was simply to have reinstated in his former position an officer who had been displaced from the same through injustice or error.' XLII, 196, *March, 1879*. (See § 410, *ante*.)

2371. In the case referred to in the preceding section, the act (as cited) authorized the reinstatement of the officer "as of the date he was previously mustered out, charging him," as it was added, "with all extra pay and allowances paid him at that time." *Held* that this officer, upon his reinstatement, was entitled to the pay of a major from the date of his muster-out (under the act of July 15, 1870), less the extra "one year's pay and allowances" then paid him in accordance with the provisions of sec. 12 of the same." XLII, 192-196. *March, 1879*.

2372. An act of Congress, in declaring in substance that an officer was unjustly and erroneously mustered out of the service in January 1871, proceeded to authorize the President "to restore him to his proper rank and promotion in the army with directions to the Secretary of War, on account of his disabilities incurred in the line of duty, to place him on the retired list." The officer, had he not been mustered out (as a captain), would have attained the rank of major on Dec. 10, 1873. *Held*, on construing this act in connection with the emphatic favorable reports upon the case by committees of the two houses of Congress, that the intent of the act clearly was to reinstate completely this officer so far as his rank was concerned, and that the President was therefore authorized (by appointment without the concurrence of the Senate—see § 2370, *ante*) to restore the officer to the army as a major with rank from Dec. 10, 1873, and thereupon to cause him to be placed upon the retired list as an officer of the army of this rank. XLII, 246, *April, 1879*.

2373. An act of Congress required the Secretary of War to order a court martial or court of inquiry "to inquire into the matter of the dismissal" of a certain officer who had been summarily dismissed by the President in 1863, and further empowered such court "to confirm or annul the action" by which he was dismissed, adding that its "find-

<sup>1</sup> See the concurring decision of the Court of Claims in this case—*Collins v. United States*, 14 Ct. Cls. 598; the Solicitor General, however, in an earlier opinion—16 Opins. At. Gen. 624, held *contra*.

<sup>2</sup> This opinion was also concurred in by the Court of Claims in a second decision in the same case, *Collins v. United States*, 15 Ct. Cls. 22. And see the similar conclusion, as to the right to pay, of the Solicitor General, in 18 Opins. At. Gen. 624.

ings" should "have the effect of restoring" the party "to his rank with the promotion to which he would be entitled if it be found that he was wrongfully dismissed, or to confirm his dismissal if it be otherwise found." Under this act the Secretary of War ordered a court of inquiry which found that the officer had been "wrongfully dismissed," and declared the dismissal to be a nullity. The act and record of the court having been referred by the Secretary of War to the Judge-Advocate General for opinion as to the executive action proper to be taken, if any, *held* that the only manner in which a dismissed officer, or other civilian, could be admitted to the army was by an appointment made pursuant to the provisions of Art. II, Sec. 2, par. 2, of the Constitution; that Congress was not empowered to appoint a civilian as an officer of the army, or to authorize a military court to make such an appointment;<sup>1</sup> that the act in authorizing the restoration of the officer by and upon the favorable finding of the court, was clearly unconstitutional and inoperative; further that no implied authority for an appointment of the officer by the *President* could properly be gathered from the act.<sup>2</sup> And added—that the principle of that extreme instance of a liberal construction of a statute in favor of the exercise of the appointing power, presented in the opinion of the Attorney General in the case of Lieut. Von Luettwitz (14 Opinions, 448), could not be extended to the present case, since by this act the function of the executive department was in terms confined to the ordering of the court; the authority to appoint, so far as any was conferred, being expressly reserved by Congress to itself, or rather to the court. XLII, 297, *May, 1879*.

#### STOPPAGE.

**2374.** The pay of an officer or soldier cannot be subjected to stoppage except by the authority of a statute or regulation specifically authorizing the same or of a sentence of court martial imposing a forfeiture or fine as a punishment, or where the party has become indebted to the United States *on account*. XXXIII, 445, *October, 1872*. The Attorney General has also held (21 Opins., 465) that "stoppage of pay against a soldier is unauthorized unless it is made in execution of the sentence of a court martial, or in pursuance of a statute, or in

<sup>1</sup> A military court, being no part of the U. S. judiciary (see § 392, *ante*), is of course not included in the "courts of law" to which a power of appointment of "inferior" officers is authorized to be given by Art. II, Sec. 2, par. 2, of the Constitution. Moreover this power, as interpreted by the authorities, properly extends only to the appointment, by the U. S. Courts, of their own inferior officers, such as clerks, reporters, or bailiffs. See 4 Opins. At. Gen. 164; 11 *id.* 213; *Ex parte Hennen*, 13 Peters, 258. Story's Com. on the Const. § 1536.

<sup>2</sup> This conclusion, however, was not accepted, and the appointment was made and confirmed.



conformity to the regulations of the army which have the force of law." The power of the Secretary of War over the subject of stoppage of pay is too narrowly restricted in the opinions above quoted. It is not possible to foresee, and by regulations to provide for, all cases which may arise within the army in which it would be reasonable and proper that the pay of a soldier should be stopped in order to cover some liability which he has incurred; and on the happening of any such case it would be reasonable and proper that the Secretary of War, representing the constitutional power of the President over the army, should exercise the same power with reference to such case, which would be exercised in the making of a general regulation relating to stoppages. The result would simply be the satisfaction of a pecuniary obligation to the United States, which the soldier had incurred in his military relation, but which it had not been practicable to provide for in advance by a regulation. The practice of the War Department is believed to be in accord with this view. 61, 169, *August, 1893*.

2375. The United States is not authorized to stop against the pay of an officer or soldier an amount of personal indebtedness to another officer or soldier, though such indebtedness may have grown out of the relations of the military service. Thus, in the absence of a sentence of court martial forfeiting the same, an officer's pay cannot legally be stopped with a view to the reimbursement of enlisted men who have deposited with him money for safe keeping, which he has failed to return when required, the officer being accountable for the same in a personal capacity only. XII, 510, *August, 1865*; XVI, 637, *October, 1865*.

2376. *Held*, that for a liability incurred during one enlistment, a soldier may under the provisions of Sec. 1766, Rev. Sts., legally be subjected to a stoppage against the pay due him under a subsequent enlistment. Card 3167, *May, 1897*; 6500, *May, 1899*; 7395, *December, 1899*.

2377. A stoppage differs from a fine or forfeiture, in that the latter is imposed as punishment for an offence while the former is a means of reimbursement or a "charge on account" to make good a loss. A stoppage cannot therefore, in the absence of a statute or regulation authorizing it, legally be imposed as a punishment for an offence. 36, 87, *October, 1889*. But it is entirely legal to stop against a soldier's pay, under the Army Regulations, an amount required to reimburse the United States for loss on account of damage done to public property, while at the same time bringing the soldier to trial by court martial for the offence involved. 62, 481, *December, 1893*.

2378. *Held* that the Government was entitled to retain so much of a

soldier's pay as would cover his indebtedness to it, even though the pay due consist in whole or in part of "detained" pay.' 62, 496, *December, 1893.*

**2379.** A soldier, who deserted from Jefferson Barracks, surrendered at Chicago, where the sum of four dollars was expended by the United States for his meals while in jail. *Held* that this sum, as substantially included within the item of "expense of apprehending deserter," specified in par. 1523, A. R. (1889), was properly charged against him on the muster-and-pay roll. 60, 167, *June, 1893.*

**2380.** The amount of the allowances of the witnesses, or other expense attending the trial by court martial of a soldier, cannot legally be stopped against his pay, whatever the offence of which he may be convicted.\* 64, 301, *April, 1894.*

**2381.** Pay due an officer or soldier cannot legally be stopped to reimburse a telegraph company for moneys received by a sergeant of the then Signal Corps for transmitting private messages over its line, the same not being a line "operated by the United States," in the sense of the act of March 3, 1883, c. 143, and the indebtedness of the sergeant being to the telegraph company only, not to the United States. 61, 185, *August, 1893.* An officer or soldier cannot legally be mulcted of any part of his pay for the satisfaction of a private claim. 33, 171, *June, 1889; Cards 5446, December, 1898; 8365, June, 1900.*

**2382.** *Held* that, under Sec. 1766, Rev. Sts., an amount of fees illegally received by a retired officer of the army while acting in the capacity of a U. S. consul (a bonded officer) in a foreign country, could legally be stopped against his army pay; the liability to the United States referred to in the section including a civil equally with a military liability.<sup>1</sup> 50, 1, *October, 1891; Card 5356, November, 1898.*

**2383.** The Army Appropriation Act of June 16, 1892, provides that "the pay of officers of the army may be withheld under Sec. 1766, Rev. Sts., on account of an indebtedness to the United States admitted or shown by the judgment of a court, but not otherwise, unless upon a special order issued according to the direction of the Secretary of War." *Held* that the last part of this provision was to be construed not separately but in connection with the former, and could not be interpreted as empowering the Secretary of War to stop the pay of officers of the army to satisfy private debts or claim for alimony. 64, 154, *March, 1894; Cards 3500, September, 1897; 6882, August, 1899; 7635, February, 1900.*

**2384.** *Held*, that pay due an officer or soldier may legally be stopped

<sup>1</sup> The punishment of *detaining* pay was abrogated by G. O. 25 of 1894.

<sup>2</sup> See Cir. 19, A. G. O., 1893.

<sup>3</sup> See *Gratiot v. U. S.*, 15 Peters, 336; *McKnight v. U. S.*, 98 U. S. 180.

to reimburse losses to post exchange, company, hospital, bakery, etc., funds; all these funds being used to carry on public agencies or instrumentalities of the Government.' Card 3171, *October, 1897*.

**2385.** A recruit absented himself from a detachment of recruits at a place in Ohio, while *en route* from the recruiting depot to his proper station, Fort Yates, N. D., and was taken to Fort Niagara and tried upon a charge of desertion but convicted of absence-without-leave only. *Held* that the only *stoppages* to which he could legally be subjected were the amount of the pay and allowances accruing during his absence, under par. 132, A. R. (see 144 of 1901), and the amount of the expenses incurred in transporting him "to his proper station," under par. 124, A. R., as amended by G. O. 14 of 1890 (see 137 of 1901). But *held* further that the words "to his proper station," in the last part of the amended regulation, were to be construed as equivalent to the expression, in the first part—"to the station of his company or to the place of his trial"; that it would not be legal to stop against him the expenses of the transportation to both places; that if the place of trial was—as here—different from the station of the company, it would be proper to stop the expenses of transportation to the former and not to the latter; and that, this being done, the stoppage of the expense of transporting him to the station of his company, after the trial, would not be authorized. **84**, 301, *April, 1894*.

**2386.** A civilian, then at Pittsfield, Mass., was duly employed, by the engineer officer in charge of a River Improvement, as an assistant at a compensation of \$150 per month, and ordered to report at Montgomery, Alabama. In subsequently settling with him for his services, the officer allowed and paid him, in addition to his salary, the amount of his expenses of travel between Massachusetts and Alabama. *Held* that such allowance was unauthorized as being in excess of the contract, which stipulated only for the payment of the salary named, and was therefore legally stopped by the accounting officers against the engineer officer's pay. **43**, 182, *October, 1890*.

**2387.** Sec. 1766, Rev. Sts., which prescribes that "no money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for which he may be liable", has not in practice been so strictly construed as to preclude the making of stoppages against the pay of officers and enlisted men in such monthly amounts as to leave a margin for necessary living expenses. Thus where the stoppage against an enlisted man was \$100, *advised* that it be collected at the rate of ten dollars per month. Card 7415, *December, 1899*.

<sup>1</sup> See § 1424, and note to § 2014, *ante*.

**SUBSISTENCE STORES.**

**2388.** Where subsistence stores were sold by a post commissary of subsistence to a mess of three officers of the post, and charged to the mess as such, *held* that such mess was not in the nature of a commercial partnership in which each member was bound for the joint indebtedness, but was simply an association, for purposes of convenience and economy, of three individuals, each of whom was bound to the United States only for his proportion—one third—of the account. And *held* that a member who had paid his proportion to one of the other members who acted as caterer but who had deceased without paying over this amount to the commissary, remained liable for such proportion to the United States. XLI, 155, *March, 1878.*

**2389.** *Held* that the "ten per cent." directed by the Army Appropriation Act of June 23, 1879,<sup>1</sup> to be added to accounts for subsistence stores "sold to officers and men" of the army, could not legally be added to the cost of the subsistence stores furnished for the prisoners at the Leavenworth Military Prison; such prisoners not being embraced in the class referred to in said act, but being provided for by a separate and distinct appropriation for the support of the prison, contained in the act of March 3, 1879, c. 182, and which is unaccompanied by any such requirement. XLI, 651, *August, 1879.*

**2390.** *Held* that the ten per cent. required by the act of June 23, 1879, to be added to the cost of subsistence stores sold to officers and soldiers, "to cover wastage, transportation, and other incidental charges," was to be added in every instance of such sale, whether or not there had been any wastage, &c., in the case of the particular article or articles sold; the "charges" intended to be covered being understood to be charges incurred in connection with the stores sold or kept for sale as a whole. XLII, 100, *December, 1879.*

**2391.** *Held* that the provision of the act of June 23, 1879, in regard to the adding of ten per cent. to the cost of subsistence stores sold to officers and soldiers, was to be viewed as qualifying the provisions of Secs. 1144 and 1145, Rev. Sts., and thus as applying only to stores sold by the United States, through the Subsistence Department. So *held* that it did not apply to sales made directly to officers and soldiers by contractors under contracts expressly stipulating for such sales to be made by them. XLIII, 100, *December, 1879.*

**2392.** On the question whether the Secretary of War has legal authority to issue a regulation authorizing the sale of quartermaster's and subsistence supplies to civilians at remote posts who are employed

<sup>1</sup> This provision, also in Army Appropriation Act of May 4, 1880, was repealed by the act July 5, 1884 (23 Stats., 108).



for services in connection with the army, such for instance as civilian tailor, shoemaker, laundryman, meat contractor, etc., it was *held*, that there is no express statutory authorization for issuing such a regulation, but a precedent for such action is found in General Orders No. 106, Adjutant General's Office, 1898, which amends paragraph 1284 of the Army Regulations to read: "Citizens at rates of pay of sixty dollars or more per month, employed with the army at remote places or in the field where food can not otherwise be procured, may be allowed to purchase from the Subsistence Department, in limited quantities for their own use, for cash at cost price, such articles of the ration or of stores kept for sales to officers and enlisted men as can be spared from the supplies on hand."<sup>1</sup> The Secretary of War has the same legal authority to promulgate the regulation proposed that he had to make the one quoted; but advised that the "meat contractor" be not included among those to whom sales are to be authorized. Card 6505, *June, 1899*.

## SUMMARY COURT.

**2393.** The act of October 1, 1890, c. 1259, substituted the summary court for the regimental or garrison court, in time of peace, much as the act of July 17, 1862, substituted, for the latter court, the field officer's court, in time of war. **43, 422, November, 1890.**

**2394.** Where a post commander sits as a summary court, no approval of the sentence is required by law, but he should sign the sentence and date his signature.\* **64, 36, February, 1894.** A certification by the *post adjutant* of the approval by the post commander of the sentence of a summary court is irregular, and should not be permitted. Card **32, July, 1894.** The commanding officer's approval should be over his own signature, and as forfeitures adjudged are operative only upon pay accruing subsequent to the approval unless otherwise directed in the sentence, the date of approval should be entered on the record. Cards **854, January, 1895; 2971, December, 1896.**

**2395.** The provision of the act that accused soldiers shall be brought before the summary court for trial "within twenty-four hours from the time of their arrest" is not a statute of limitations nor jurisdictional in its character, but directory only—directory upon the officers whose duty it is to bring offenders before the court. The proceedings will thus be legally valid though the accused does not appear for trial within the period specified. *So held*, in a case of an accused soldier

<sup>1</sup> This regulation before amendment, provided, among other things, that the sale to a civilian employed with the army, etc., should be "at invoice or contract prices with 10 per cent. added." It has been further amended by G. O. 118 of 1890. See A. R. 1430 of 1901.

<sup>2</sup> See A. R. 932, 933 of 1895 (1031, 1032 of 1901); also Court-Mar. Manual (1901), p. 74, par. 16.

arrested on Saturday, that the court did not, by not sitting on Sunday, lose jurisdiction; and therefore that it is not necessary that a summary court should ever sit on a Sunday.<sup>1</sup> 51, 151, *December, 1891*.

2396. The provision in the act in regard to the trial being had within twenty-four hours of the arrest being directory only, a trial held after that time is entirely valid. Thus, where a soldier, by reason of drunkenness or otherwise, is not in a condition to be tried within that time, his trial may be postponed till he is in proper condition. 64, 108, *March, 1894*.

2397. *Held* that the provision of the 94th Article of War, relating to the hours of session of courts martial, was not applicable to summary courts. 54, 304, *July, 1894*.

2398. The procedure of the summary court should be similar to that of the older courts martial. The charges and specifications should be read to the accused, and he be required to plead guilty or not guilty, and the witnesses should be sworn. But the testimony is not set forth in the record.<sup>2</sup> 44, 13, 17, *November, 1890*.

2399. The act of 1890, in providing that the trial officer "shall have power to administer oaths," has reference to the oaths of witnesses. The officer himself is not sworn. But the witnesses must be sworn; and, in a case in which it appeared that they were not in fact sworn, *held* that the proceedings and sentence were invalidated, and that a forfeiture imposed was illegally charged against the accused, who should be credited with the amount of the same on the next muster-and-pay roll. But the record need not state in terms that the witnesses were sworn; it will be presumed that the law has been complied with unless the contrary appears. 48, 7, *June, 1891*; 53, 301, *May, 1892*.

2400. A summary court is not empowered to issue process of attachment to compel the attendance of a civilian witness. 51, 468, *June, 1892*.

2401. For a summary court to impose a forfeiture of ten dollars, when the soldier is receiving only nine dollars a month because of the retention of four dollars under the act of June 16, 1890, is not in excess of authority.<sup>3</sup> The true monthly pay is thirteen dollars. The retention does not affect the amount of the pay but simply the time of payment. 44, 288, *December, 1890*.

2402. A summary court is not empowered to impose a sentence of dishonorable discharge. Such punishment is not in terms authorized,

<sup>1</sup>See Circ. No. 2, A. G. O., 1891, do. of 1892. The present summary court act, approved June 18, 1898, directs that the accused "shall be brought to trial within twenty-four hours of the time of the arrest, or as soon thereafter as practicable."

<sup>2</sup>As to the procedure and form of record of summary courts, see *Court-Mar. Manual* (1901), pp. 73-75 and 148.

<sup>3</sup>See now 83d Article of War, as amended March 2, 1901, set out in note 1, page 72, *ante*.

by Art. 83, to be adjudged by regimental or garrison courts, and it is restricted to general courts martial by the 4th Article of War. 46, 402, *April, 1891*; Card 350, *September, 1894*.

2403. By the act of July 27, 1892, c. 272, s. 5, "commanding officers authorized to approve the sentences of summary courts" are empowered to "remit or mitigate the same." *Held* that where a soldier, who had been convicted by a summary court, had passed into another command, so that the officer who approved his sentence was no longer his commanding officer, such officer could not legally exercise the power of remission or mitigation of the sentence.<sup>1</sup> 63, 337, *January, 1894*.

2404. General courts martial have exclusive jurisdiction to try offences punishable capitally. A trial therefore by a summary court for a violation of the 21st Article of War or for desertion in time of War, would be void, and the sentence adjudged should be set aside as such. Cards 6186, *April, 1899*; 7392, *December, 1899*.

2405. The Summary Court Act of June 18, 1898, provides, *inter alia*: "That the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion, or company, or other detachment in the army, shall have power to appoint for such place or command, or in his discretion for each battalion thereof, a summary court to consist of one officer to be designated by him," for the trial of enlisted men, and "that when but one commissioned officer is present with a command, he shall hear and finally determine such cases". This was intended to provide for the trial of enlisted men under all conditions of service. *Held*, therefore, that the surgeon in command of the Army and Navy General Hospital, Hot Springs, Ark., being an officer of the army, has authority under this act to appoint a summary court for the trial of enlisted men of the army under his command. Card 856, *February, 1900*. And *held*, that if the U. S. general hospital at Fort Myer, Va., and at Fort McPherson, Ga., were not included in the command of the respective post commanders, the surgeons commanding the hospitals would be competent under the act cited to appoint summary courts. Cards 4826, *August, 1898*; 5713, *February, 1899*. *Held*, also, where the division field hospital and the division field ambulance company were independent commands and responsible direct to the division surgeon and division commander, that their respective commanders were competent to appoint summary courts for the same.<sup>2</sup> Card 4966, *October, 1898*. And the surgeon in command of a U. S.

<sup>1</sup> The summary court referred to in this and preceding paragraphs is the summary court established by the act of Aug. 1, 1890. An examination of the present Summary Court Act of June 18, 1898, will show however that the opinions are applicable to the latter act.

<sup>2</sup> See Circ. 49, A. G. O., 1898.

hospital ship is a commanding officer within the meaning of the Summary Court Act and may appoint such court for the trial of enlisted men on such ship. Card 4931, *September, 1898*.

2406. *Held*, that the summary court is a court martial within the meaning of the acts making appropriation "for expenses of courts martial, \* \* \* and compensation of witnesses, \* \* \* attending the same." The summary court officer would make the necessary certificate as to the fact of attendance in the case of a civilian witness and administer the oath respecting his expense account. Card 7890, *April, 1900*.

#### SUPERNUMERARY LIST.

2407. *Held*, that it was clearly contemplated by sec. 12, act of July 13, 1870, c. 234, that the President, though not absolutely in terms required to transfer officers to the supernumerary list prior to January 1, 1871, would in fact do so, so that *all* the officers classed as supernumerary would be equally eligible to appointment to vacancies occurring prior to said date; preference only being given to those of superior rank, length of service and fitness. *So, advised* that the case of an apparently meritorious officer who was placed on the supernumerary list and mustered out on one and the same date, January 1, 1871, and thus deprived of all claim or opportunity to be so appointed, was not equitably disposed of, and for this reason would commend itself to the favorable consideration of Congress in connection with an application on the part of the officer for relief and restoration. XXXIX, 570, *June, 1878*.

#### SUSPENSION.

2408. The punishment of suspension, as imposed by sentence, is usually in the form of a suspension from *rank* or from *command* for a stated term, sometimes accompanied by a suspension from *pay* for the same period. Suspension from rank *includes* suspension from command.<sup>1</sup> VII, 8, *January, 1864*.

2409. A suspension from rank does not affect the right of the officer to his *office*. He retains the same as before, and, as an officer, remains subject as before to military control as well as to the jurisdiction of a court martial for any military offence committed pending the term of suspension.<sup>2</sup> XXX, 157, *March, 1870*; XXXVII, 536, *May, 1876*; XXXVIII, 221, *August, 1876*; XXXIX, 446, *February, 1878*.

2410. The effect of a suspension from rank (beside detaching the

<sup>1</sup> McNaghten, Annotations of the Mutiny Act, p. 17, *et seq*.

<sup>2</sup> See 5 Opins. At. Gen. 740; 6 *id.* 715.



officer from the performance of the duties incident to his rank) is to deprive him of any right to *promotion* to a vacancy in a higher grade, occurring pending the term of suspension and which he would have been entitled to receive by virtue of seniority had he not been suspended; such right accruing to the officer next in rank. VII, 8, *January, 1864*; XXVIII, 164, *October, 1868*; XXXVII, 536, *May, 1876*.

2411. Suspension from rank does not, however, deprive the officer of the right to rise in files in his grade, upon the promotion, for example, of the senior officer of such grade. The number of an officer in the list of his grade is not an incident of his rank but of his appointment to office as conferred and dated, and—as we have seen—suspension does not affect the *office*. Moreover loss of files is a *continuing punishment*, and if held to be involved in suspension from rank, the result would be that, for an indefinite period after the term of suspension had expired, the officer would remain under punishment, the sentence imposed by the court being thus *added to* in execution, contrary to a well known principle of military law. XXXIII, 69, 109, *June, 1872*.

2412. It is further the effect of a suspension from rank that the officer loses for the time the minor rights and privileges of priority and precedence annexed to rank or command. Among these is the right to select quarters relatively to other officers. And where quarters are to be selected by several officers, one of whom is under sentence of suspension from rank, the suspended officer necessarily has the last choice. Or rather he has no choice, but quarters are *assigned* him by the commander; for, being still an officer of the army, though without rank, he is entitled to *some* quarters. But *advised* that an officer sentenced to be suspended from rank could not, because of such suspension alone, be deprived of quarters previously duly selected and occupied at the time of the suspension; such a sentence not affecting a right previously accrued and vested.<sup>1</sup> XXVII, 241, *September, 1868*; XXIX, 672, *February, 1870*; XXXVII, 536, *May, 1876*; 60, 371, *November, 1891*.

2413. Under existing usage (1892), an officer suspended by sentence from rank and command is deemed entitled to retain his quarters. But such rule may, in some cases, work a considerable inconvenience as well as prejudice to discipline. As where, for example, the suspended officer is a post commander, and continues, pending the term of his suspension and while another officer has succeeded him as commander, to occupy the proper commanding officer's quarters. An army regula-

<sup>1</sup> But the Secretary of War decided, May 27, 1876, that an officer under suspension is not deprived of his usual right to quarters according to rank. This was reaffirmed by the War Department in 1892. See *reg.* VII, *Circ.* I, A. G. O., 1892.

tion, prescribing that an officer in such a status shall not be entitled to retain, or to select, quarters by virtue of rank, but shall have assigned him any quarters that are available at his late station, or elsewhere—*advised* as desirable to be adopted. 53, 322, *May, 1892*.

2414. Suspension from rank does not involve a status of confinement or arrest. VII, 242, *February, 1864*. In sentencing an officer to be suspended from rank, it is indeed not unusual for the court to require that he be confined during the term of suspension to his proper station, or that of his regiment, &c., *i. e.*, that the sentence be executed there. Where this is not done,—while the suspended officer is not entitled to a leave of absence, it cannot affect the execution of his sentence to grant him one, and leaves of absence are not unfrequently granted under such circumstances. XXXVI, 226, *February, 1875*.

2415. Suspension from rank or command does not involve a loss or authorize a stoppage of pay for the period of suspension.<sup>1</sup> Pay cannot be forfeited by implication. Unless therefore the sentence imposes a suspension from rank (or command) "*and pay*," or in terms to that effect, the suspended officer remains as much entitled to his pay as if he had not been suspended at all, and to require him to forfeit any pay would be *adding* to the punishment and illegal. XXIII, 427, *April, 1867*; XXVIII, 164, *October, 1868*; 62, 340, *November, 1893*.

2416. A sentence "to be suspended from the Military Academy," in the case of a cadet, does not deprive him of pay during the term of the suspension. XXIII, 427, *April, 1867*. Nor does a commutation of dismissal to suspension affect pay. Thus where a sentence of dismissal of a cadet was commuted to suspension for one year, *hold* that he was entitled to full pay during the year of suspension.<sup>2</sup> 62, 340, *November, 1893*; Card 3226, *May, 1897*.

2417. Where, however, the suspension is in terms extended by the sentence to *pay*, the pay is forfeited absolutely, not merely withheld. And *all* the pay is forfeited, unless otherwise expressly indicated in the sentence. XXIII, 556, *July, 1867*. The forfeiture, imposed by a sentence of suspension from rank (or command) and pay for a designated term, is a forfeiture of the pay of that specific term, the suspension of the rank and that of the pay being coincident. Under such a sentence the officer cannot legally be deprived of pay due for a period prior to the suspension. XXII, 113, *May, 1866*. Where an officer was sentenced to suspension from rank and pay for three months, *hold* that his entire pay for those months was absolutely forfeited, notwithstanding that the pay of officers of his grade was increased by statute pending the term. XXIV, 462, *April, 1867*.

2418. A sentence of suspension from rank and pay does not affect

<sup>1</sup> See 4 Opins. At. Gen. 444; 6 *id.* 203.

<sup>2</sup> See, sustaining this opinion, *Conrad v. U. S.*, 32 Ct. Cls., 139-146.

the right of the officer to the allowances which are no part of his pay,<sup>1</sup> as the allowance for rent of quarters, as also the allowance for fuel.<sup>2</sup> XXIX, 673, *February, 1872*; XXXVIII, 426, *January, 1877*.

2419. The status of an officer under suspension is the same whether such suspension has been imposed directly by sentence or by way of commutation of a more severe punishment. Thus where a sentence of dismissal was commuted to suspension from rank on half pay for one year, *held* that the officer, while forfeiting the rights and privileges of rank and command during such term, was yet amenable to trial by court martial for a military offence committed pending the same. XXXVIII, 221, *January, 1877*.

2420. Where an officer, when under a sentence of suspension, is ordered by the commander who approved the sentence, or some higher competent authority, to resume his command or the performance of his regular military duty, such order will in general operate as a constructive remission of the punishment and thus terminate the suspension;<sup>3</sup> but allowing an officer while under suspension to perform certain slight duties in closing his accounts with the United States would not have such effect. XXXVII, 190, *December, 1875*.

2421. A sentence of suspension from duty and pay for fifteen days does not imply confinement to quarters, or involve a condition of arrest. It is customary for an officer undergoing sentence of suspension from pay and duty to be allowed the limits of his command. VII, 242 *February, 1864*.

2422. Where a sentence suspended an officer "from the service for the term of six months," *held*, in view of the general principle that pay may not be forfeited by implication, that such sentence could not properly be construed as intending a forfeiture of pay, but should be regarded as imposing a suspension from rank, promotion, and command only; that a larger meaning should not be ascribed to its language merely because it was expressed in general terms.<sup>4</sup> XXIII, 427, *April, 1867*.

2423. Like dismissal, suspension takes effect upon and from notice of the approval of the sentence officially communicated to the officer.<sup>5</sup>

<sup>1</sup> McNaghten, 27.

<sup>2</sup> And, on the same principle, the later and existing privilege of purchasing fuel at a reduced rate would not be affected.

<sup>3</sup> See McNaghten, 22.

<sup>4</sup> The forms, "to be suspended from service" and "from duty," are rarely employed in the military service. The form, "to be suspended from rank and duty," occurs, however, in G. C. M. O. 19, A. G. O. of 1885. Suspension from duty, as distinguished from suspension from rank, is a recognized punishment in the naval service. Navy Regulations, Art. 32, sec. 2; Harwood, 134-5.

<sup>5</sup> Suspension, as a punishment for a *non-commissioned* officer, is not authorized in terms in Art. 101, nor is it contemplated in the Army Regulations. It has been adjoined in but rare cases, and cannot be regarded as sanctioned by principle or usage. But see a comparatively late instance in G. C. M. O. 33, Dept. of the East, 1872.

either by the promulgation of the same at his station, or, where he is absent therefrom by authority, by the delivery to him of a copy of the order of approval or other form of official personal notification of the fact of the approval.<sup>1</sup> XXVII, 241, *September, 1868*; XXXIII, 109, *June, 1872*; XXXVIII, 341, *October, 1876*.

2424. Under the ruling of the Secretary of War, as published in Circ. No. 3, A. G. O., 1888, an officer, under suspension but not required by his sentence to be "confined to the limits of his post," is not entitled to forage for his horse or horses during the term of his suspension. 59, 458, *May, 1892*.

## T.

### TAX.

2425. The authorities of a State or Territory (or, of course, of a county, town, &c.) are not empowered to tax an officer or soldier of the army on account of his pay, or for any personal property in his possession properly required for the due exercise of his office or performance of his military duties. Officers and soldiers of the army are instrumentalities provided by law to enable or assist the President to exercise his constitutional function of Commander-in-chief and Executive of the nation. The pay and emoluments furnished them by Congress are means to make their services possible and effective, and their right to receive and enjoy the same cannot be in any degree impaired or infringed upon by the authorities of a distinct and inferior sovereignty. And the same principle of exemption properly applies to their arms, equipments, horses, and other personal property required to be possessed and employed by them in the military service.<sup>2</sup> XXX, 215, *March, 1870*; XXXIX, 563, *June, 1878*.

<sup>1</sup> Compare §§ 1197, 1848, and 1849, *ante*.

<sup>2</sup> In the leading case applicable to this subject—*Dobbins v. Commissioners of Erie county*, 16 Peters, 435—the Supreme Court of the United States, in declaring to be unconstitutional a State statute, so far as it authorized the taxing of the *office* of a captain in the U. S. revenue service, laid as follows: "The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to declare what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Any law of a State imposing a tax upon the office, diminishing the recompense, is in conflict with the law of the United States which secures the allowance to the officer." Further, "Taxation by a State cannot act upon the instruments, emoluments and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. \* \* \* The State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." In a later case, *Society for Savings v. Conte*, 6



**2426.** The principle exempting from taxation the office or salary of an officer of the United States applies to officers on the retired list equally with those on the active list of the army. Retired officers, being a part of the army, are a part of the machinery of the Government, though a part not often called into active operation. XXXV, 154, *December, 1874*; 291, *March, 1875*. But though a retired officer cannot legally be taxed by State or municipal authorities on account of his army pay as property or income, he is subject to be taxed for other property owned and held at his place of residence, like any other citizen. XLII, 669, *June, 1880*. Similarly held with respect to enlisted men on the retired list of the army. Cards 3016, *March, 1897*; 6799, *July, 1899*.

**2427.** The question of residence is one of personal intent; an act of will being necessary to acquire it. An officer or soldier on the active list cannot properly be taxed as a *resident* of a State or Territory on the sole ground that he is stationed at a post or place within such State or Territory. A member of the army is commorant at his military station not by his own volition but in pursuance of the orders of a military superior. By further orders, also, he is liable at any time to be removed to a different station and one in another State. His abiding at his station is therefore both involuntary and temporary, and it is in general much more reasonably presumable that an officer's station is not his residence than that it *is* such.<sup>1</sup> XXX, 215, *March, 1870*;

Wallace, 605, the same court declares, "All subjects over which the sovereign power of a State extends are, as a general rule, proper subjects of taxation, but the power of a State to tax does not extend to those means which are employed by Congress to carry into execution the powers conferred in the Federal Constitution." Unquestionably the taxing power of the States is very comprehensive and pervading, but it is not without limits. State tax laws cannot restrain the action of the national government, nor can they abridge the operation of any law which Congress may constitutionally pass." This general doctrine is applied by Atty. Gen. Black, 9 Opins. 477, as follows: "The authorities of a State cannot impose a tax upon the salary of a Federal officer, or upon the compensation paid by the United States to any person engaged in their service." And illustrating the principle involved, see also *McCulloch v. Maryland*, 4 Wheaton, 316; *Weston v. Charlestown*, 2 Peters, 440; *Searight v. Stokes*, 3 Howard, 151; *Bank of Commerce v. N. Y. City*, 2 Black, 620; *Provident Inst. v. Mass.*, 6 Wallace, 611; *The Banks v. The Mayor*, 7 *id.* 16; *Bank v. Supervisors*, *id.* 26; *Railroad Co. v. Peniston*, 18 *id.* 5; *Carroll v. Perry*, 4 McLean, 25; *Stetson v. Bangor*, 56 Maine, 274; *Opinion of Justices*, 53 N. Hamp. 634; *United States v. Weiss*, 5 Pa. L. J. R. 61; *West. Un. Tel. Co. v. Richmond*, 26 Gratt. 1; *State v. Carbon*, 32 Ind. 1, 7 Opins. At. Gen. 578, 14 *id.* 199. In the case of *Railroad Company v. Peniston*, *supra*, it is specified by Strong J. that, "the States may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the National government."

<sup>1</sup>That a person, however, shall be a resident or inhabitant (terms having practically the same meaning in law of a State, is not essential to render him or his property taxable. The power of a State to tax, which is "one of its attributes of sovereignty," extends to all subjects—persons, property, or business *within its jurisdiction*, and it may, as a general rule, legally tax personal property held or being within its limits, without regard to the domicile of the owner. See case of *State Tax on Foreign-Held Bonds*, 15 Wallace, 319; *Railroad Co. v. Peniston*, 18 *id.*, 20; *Duer*

XXXVII, 396, *March, 1876*; XXXIX, 563, *June, 1878*; XLI, 120, *February, 1878*.

**2428.** An officer or soldier of the army, though not taxable officially, may be and often is taxable personally. He is not taxable by a State for his pay, or for the arms, instruments, uniform clothing, or other property pertaining to his military office or capacity, but as to household furniture and other personal property, not military, he is (except where stationed at a place under the exclusive jurisdiction of the United States) equally subject with other residents or inhabitants to taxation under the local law.<sup>1</sup> LIII, 598, *April, 1888*; LV, 423, *June, 1888*; 49, 217, *September, 1891*; Cards 472, *October, 1894*; 3521, *September, 1897*; 3574, *November, 1897*; 4888, *September, 1898*.

**2429.** The fact that a man has formerly been a soldier, or is now in the receipt of a pension, or is an inmate of a national home for volunteers, can affect in no manner his liability to taxation in the State of his residence or habitation, unless, and only so far as, he may belong to a class specially exempted from taxation by the laws of the State. There is nothing in the laws of the United States to relieve such a person from being taxed for his poll, or on his property. 60, 325, *July, 1893*; 65, 161, *May, 1894*; Card 2513, *August, 1896*.

**2430.** The sovereignty and jurisdiction over reserved lands in a Territory, so long as it remains such, reside exclusively in the United States. So held, that the Territorial authorities of Wyoming, then a Territory, had no legal authority to enact a license fee or other tax for the selling of beer on the military reservation of Fort D. A. Rus-

*v. Small*, 4 Blatch, 263; *People v. McGreevy*, 34 Cal., 432; *Hanson v. Vernon*, 27 Iowa, 48; *City of Philad. v. Tryon*, 35 Pa. St., 401; 14 Opins. At. Gen., 200. In the opinion last cited, the Attorney General, upon the question of the authority of the State of New York to tax the property of soldiers held by them upon a part of the government lands at West Point as to which a cession of the State jurisdiction had not in fact then been obtained, held as follows: "If the personal property referred to is of a kind subject to taxation by the laws of the State, and its situs is within the territorial jurisdiction of the State, I do not think that the fact that the owner is an enlisted man in the service of the United States and has done nothing to gain residence or citizenship in the State, is in itself sufficient to exempt the property from State taxation." And it is added, "In regard to land owned by the United States within the limits of a State over which the State has not parted with its jurisdiction, the United States stand in the relation of a proprietor, and the local officers have, in my opinion, the same right to enter upon such land, or into the buildings located there and seize the personal property of individuals for non-payment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the same purpose; it being understood that in the former case the right must be so exercised as not to interfere with the operations of the General Government." And see 14 Opins., 27. Persons, however, residing within a reservation or place, *exclusively* jurisdiction over which has been ceded to and reserved by the United States, are not taxable by the authorities of the State within the limits of which the post or place is situated. See *Mitchell v. Tibbets*, 17 Pa. k., 208, *Opinion of Justices*, 1 Met., 580; *Commonwealth v. Young*, Bright, 302; 6 Opins. At. Gen., 577—cited in note to § 676 *ante*.

<sup>1</sup>See *Finley v. City of Phila.*, 32 Pa. St., 381; also *Hilliard, Law of Taxation*, 67.

sell; the only tax payable therefor being the retail dealer's tax of \$20, imposed by the United States under Sec. 3244, Rev. Sts. L., 71, *February, 1886*.

**2431.** *Held*, that as exclusive jurisdiction had not been ceded by the State of Nebraska over the military reservation of Sidney Barracks, the State authorities could legally levy a license tax for the selling of beer at the post canteen. L., 153, *March, 1886*. And similarly held as to the authority of officials of Michigan to tax, under the laws of that State, the selling of liquor at the canteen of Fort Mackinac, a post not under the exclusive jurisdiction of the United States. 36, 161, *October, 1889*.

**2432.** *Held*, that the officer in charge of a canteen, in making sales of cigars, would, though the same were sold to the canteen in the first instance by the Subsistence Department of the Army, be a dealer in manufactured tobacco in the sense of the act of March 3, 1883, and as such liable to pay the government tax of \$2.40 *per annum*, prescribed thereby.<sup>1</sup> L., 217, *April, 1886*.

**2433.** The Mackinac National Park was established by the act of Congress of March 3, 1875, which also authorized the Secretary of War to grant leases, for building purposes, of certain small parcels of land within the park. Under this authority a number of parcels were leased upon which improvements were made by the lessees, and the State authorities have proceeded to impose taxes upon such improvements. By the act of Congress of June 15, 1836, authorizing the admission of the State, lands of the United States within the State were to be exempted from taxation. But the State has never ceded to the United States exclusive jurisdiction over the lands of this park, and therefore never parted with its authority to tax private property located therein. *Held* that the improvements referred to were legally taxable as the private property of individuals under the laws of the State. 39, 89, *February, 1890*.

**2434.** Under the act of Congress admitting California as a State—act of September 9, 1850, c. 50—and under subsequent statutes enacted by the State Legislature, all land of the United States, and all buildings and improvements belonging to the United States, within that State, are exempted from taxation by the State.<sup>2</sup> LIV, 189, *August, 1887*.

**2435.** In ceding to the United States exclusive jurisdiction over a military reservation, the act of the legislature of the State need not

<sup>1</sup> The "canteen," referred to in this and the two preceding sections, was not the same as the "post exchange" which is maintained under existing regulations (1900). See opinion, Court of Claims, quoted in note to § 2014, *ante*.

<sup>2</sup> See *People v. Morrison*, 22 Cal., 74.

specifically relinquish the right to tax, as the State independently of any act of cession has no right to tax the means or instrumentalities whereby the government of the United States performs its functions. **64**, 330, *April, 1894*. And this includes and applies to a municipality within the State, as being a part of the State and created by it. So *held*, that a tax levied by the city of Buffalo, N. Y., on the lands of the Fort Porter military reservation, for non-payment of assessments, or otherwise, was wholly illegal and void. **31**, 480, *April, 1889*. Similarly *held*, that the city authorities of Highland Park, Illinois, were not empowered to levy on the Fort Sheridan reservation for the improvement of adjacent lands or for other public improvements. **38**, 183, *January, 1890*.

**2436**. Certain land was conveyed to the United States by the City of St. Paul, Minn., in 1892, for the erection thereon of a quartermaster and commissary depot, an appropriation having been made by Congress for the purpose on condition that the land should be conveyed to the United States free of cost. *Held*, that the property is an instrumentality of the United States government, and as such is not subject to local taxation of any kind, and therefore not subject to an assessment for street improvements. This principle declared by Chief Justice Marshall in *McCulloch v. Maryland* (4 Wheaton, 315) has been applied in a large number of later cases (25 Am. and Eng. Enc. of Law, 106, *et seq.*), and can no longer be questioned.<sup>1</sup> Card 2598, *September, 1896*. Similarly *held*, with respect to assessments, under State legislation and municipal ordinance, for the improvement of street and side walks adjacent to the military reservation of Jackson Barracks, Louisiana. Card 2637, *September, 1896*. And *held*, that a tax on real estate purchases under the laws of Tennessee would not be operative against the United States as purchaser of lands in that State for the Shiloh National Military Park. Card 3062, *April, 1897*. Also *held* that the United States was not liable for an assessment for laying water pipes along the east side of the National Cemetery, Philadelphia,

<sup>1</sup>The Comptroller of the Treasury, in an opinion dated January 30, 1896 (Vol. II, 375), said: "It is well established law that the property of the United States, or any of the instrumentalities employed by them in the performance of their proper functions, is not the subject of taxation by the States or any subdivisions thereof. (*McCulloch v. Maryland*, 4 Wheat, 316; *Osborn v. Bank of the United States*, 9 Wheat, 738; *Weston v. Charleston*, 2 Pet. 449; *Dobbins v. Commissioners*, 16 Pet. 435; *Bank of Commerce v. New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall., 200.) Most of these cases related to the taxation of instrumentalities adopted by the United States for the proper execution of the powers vested in the Federal government. The principle has been specifically applied to the taxation of the property of the United States (9 Opin. A. G., 291), has been acquiesced in by the courts of all the States in which the question has arisen (*Andrew v. Auditor*, 28 Grattan, 115; *Chicago, etc., Railway Company v. City of Davenport*, 51 Iowa, 451), and has also been specifically applied to assessments for public works from which specific benefits would be derived (*Fagan v. Chicago*, 84 Ill., 227)."



Pa. (Card 3930, *March, 1898*), or for a "consumption tax" levied on sugar purchased in Porto Rico for the use of United States troops. Card 6054, *March, 1899*. Nor is the post exchange, as a recognized instrumentality of the government of the United States (see note to § 2014, *ante*), liable for local or municipal taxes or licenses on the sale of commodities for the exclusive use of persons in the military service. Card 7324, *November, 1899*.

## TERRITORY.

**2437.** The officers and soldiers of the army within a Territory are subject to its criminal laws equally with its citizens, except where the enforcement of such laws would obstruct the operations of the United States. 51, 129, *January, 1892*.

**2438.** The military should obey the subpoenas of the district courts of Territories, which, under Sec. 1910, Rev. Sts., are vested, in all cases arising under the Constitution and laws of the United States, with the same jurisdiction as the U. S. circuit and district courts. Secs. 877 and 911, Rev. Sts., prescribe as to the form and effect of such subpoenas, and where a subpoena served upon an officer or soldier conforms substantially with these forms, it should be complied with. LIV, 124, *July, 1887*.

**2439.** A Territorial statute is operative upon a military reservation within the Territory, so long as it does not conflict with the laws of the United States, or with the military administration or legitimate operations of the Government. Thus, *held* that a statute of Arizona, making it penal to sell intoxicating liquor to Indians, while it would inhibit a post canteen from selling beer (if intoxicating) to Indians in general, could not legally affect the sale of such beer to Indians who were enlisted soldiers of the United States and therefore within the regulations of the army allowing such sale to soldiers under certain conditions.<sup>1</sup> 48, 464, *August, 1891*.

## TRIAL.

**2440.** Except by the authority of express statute, an accused can never be *entitled* to be tried by court martial. Where he is amenable to trial, the Government may cause him to be tried or may waive a trial, at discretion. 65, 259, *June, 1894*.

<sup>1</sup>See U. S. v. Hurshman (53 Fed. Rep., 543), in which it was held that an Indian of the Nez Percés tribe, a soldier in the United States Army, was an Indian under the charge of an Indian superintendent or agent within the meaning of Sec. 2139, Rev. Sts., which provides that every person who disposes of spirituous liquors to any Indian "under the charge of any Indian superintendent or agent" shall be punishable.

2441. The fact that an accused soldier was tried with hands or feet in shackles, or with ball-and-chain attached, these having been omitted to be removed during the hearing before the court, does not, however reprehensible, affect the legal validity of the proceedings or sentence. L, 33, *February, 1886*; LIII, 196, *October, 1886*; LV, 686, *July, 1888*.

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U.

## U. S. COMMISSIONER.

2442. Where a U. S. commissioner in Indiana issued to a U. S. marshal a warrant for the arrest of a deserter from the army, and, upon such deserter being brought before him, adjudicated the question of his right to discharge from the military service, and ordered him discharged therefrom—*held* that the entire proceeding was *coram non jure* and a gross assumption and exceeding of authority, and *advised* that the facts of the case be communicated to the Attorney General for his action, and that the deserter be forthwith re-arrested and brought to trial by court martial. 58, 287, *March, 1893*.

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V.

## VARIANCE.

2443. A material variance between the name of the accused in the specification and in the sentence should, if possible, be corrected by a re-assembling of the court for a revision of its sentence. If this be rendered impracticable by the exigencies of the service, the sentence should in general be disapproved as fatally defective. Thus *held*, in a case where the names in the sentence and the specification were entirely different, the one being John Moore and the other James Cunningham (XVII, 601, *February, 1866*); also in cases in which, while the surnames were the same, the christian names were quite different, one being George and the other William, &c. (IX, 27, 134, *May, 1864*); also in a case where the name in the sentence, though similar to that in the specification was not *idem sonans*, as where the accused was arraigned upon charges in which he was designated as Woodworth, but was sentenced under the name of Woodman. II, 555,

*June, 1863.* A difference, however, in a middle initial is not a material variance, a middle name not being an essential part of the christian name in law.<sup>1</sup> XIII, 481, *March, 1865*; Card 9066, *October, 1900.*

## VOLUNTEERS.

**2444.** The volunteer force during the civil war was not a part of the militia, but of the army of the United States. Though assimilated to the militia in some respects, as, for example, in the mode of original appointment of regimental and company officers, it was as distinct *in law* from the militia, as was the so-called "regular" contingent of the army.<sup>2</sup> Volunteer officers, once mustered into the service of the United States, and while they remained in that service, did not differ substantially from regular officers in their status, rights, or otherwise. Their tenure of office was indeed briefer: this, however, was not a material legal distinction, since the term of regular officers was also in some cases limited by statute to a definite period—as the duration of the existing war. XXXIV, 459, *September, 1873.*

**2445.** In a case of a volunteer officer unjustly dismissed by sentence or order during the civil war, and applying for restoration, there is the obstacle (not encountered in a case of a regular officer) that the volunteer contingent of the army has been long since disbanded, so that a restoration to office in the same is impracticable. And as a dismissed officer cannot of course be granted an honorable discharge from the army without first being readmitted to the army by a new appointment, and a volunteer officer cannot *as such* be so readmitted, *advised*, in a case of a volunteer officer applying for relief on account of an unjust dismissal, that the form of relief most apposite to his case would be a special enactment giving him *pay* from the date of his dismissal—reciting that the same was based upon insufficient grounds—to the date of the final muster-out of his regiment, precisely as if he had continued regularly in the service during the interval. XLIII, 235, *February, 1880.*

**2446.** Officers of volunteers, or officers holding office in the army of a limited tenure, who, without change of rank, were incorporated into

<sup>1</sup>That the law "recognizes but one christian name," and that the insertion or omission of a middle initial or initials "will have no effect in rendering any proceeding defective in point of law," see 2 Opins. At. Gen., 332; 3 *id.* 467, also *Franklin v. Tallmadge*, 5 Johns., 84; *Roosevelt v. Gardinier*, 2 Cow., 463; *State v. Webster*, 30 Ark., 168.

<sup>2</sup>As illustrating the distinction made in Sec. 8, Art. 1, of the Constitution, between the army and militia, and indicating the status of the volunteers during the civil war, as a part of the former, see *Kerr v. Jones*, 19 Ind., 351, *Wanlan v. White*, *id.* 471; In the matter of *Kimball*, 9 Law Rep., 503; *Burroughs v. Peyton*, 16 Gratt., 483, 485.

the military establishment at the end of the civil war, by the act of July 28, 1866, or other statute, became, or remained, as permanently and completely officers of the regular army as if they had been originally appointed in the same;<sup>1</sup> and brevet commissions held by such officers prior to such incorporation remained thereafter as valid and effectual as did the original commissions to which such brevet commissions were incidental, and fully conferred in the regular army the brevet rank specified in the same.<sup>2</sup> XXX, 1, *May, 1869*.

2447. In the case of the volunteers during the civil war, the muster-in was the regular form of acceptance into the service. "Enrolment" or "enlistment" was a mere offer of service not complete till acceptance and muster-in.<sup>3</sup> In some cases indeed there was no formal muster-in, but the fact of acceptance was sufficiently evidenced by the paying of the soldier, placing him on duty, or availing of his service, or otherwise treating him as duly in the military service of the United States. 54, 313, *July, 1892*; Cards 7050, 9159, *October, 1900*.

2448. The so-called Quartermaster's Volunteers, of 1864, composed of clerks and other civilian employees of the War Department, were not authorized by statute to be formed into a volunteer organization, nor were they authorized to be paid or in fact paid as such or otherwise; nor were they mustered into the military service or mustered out or discharged from it. They were merely a civilian body organized with a view to service during the temporary emergency that might arise through the invasion of Maryland by the enemy. So held that the application of an officer to have his name entered on the Army Register as having been a field officer of such organization (as a part of the volunteer army), should be denied. Both Sec. 1226, Rev. Sts., and sec. 2 of the act of June 18, 1878, c. 263, authorizing such entries, contemplate that the officer shall have held volunteer rank, and shall have served as an officer of volunteers in the army of the United States. 32, 42, *April, 1889*; 38, 435, *February, 1890*.

2449. The term "volunteer army" (as comprehensively used) means that temporary military organization or body of men which the Government usually employs and maintains in the military service in time of war or other public danger. It is made up of (1), persons who voluntarily make their engagements directly with the United States to serve; (2), persons who are conscripted directly by the United States

<sup>1</sup> See the confirmatory opinion of Atty. Gen. Hoar as to the status of the judge advocates of the army, in 13 Opinions, 96-99.

<sup>2</sup> See *contra*, 17 Opins. At. Gen., 3, 46.

<sup>3</sup> See, to the same effect, opinion of the Attorney General, dated February 27, 1901. See, also, §§ 1751-1754, *infra*.



and forced to serve: (3), persons who voluntarily engage with a State to serve in a State militia organization, and are (together with that organization) called into the United States service as State militia by the President; (4), persons who are drafted by a State and forced into a State militia organization, and are (together with that organization) called into the United States service as State militia by the President. Those who make volunteer engagements directly with the United States to serve, and those who are conscripted directly by the United States and forced to serve, constitute organizations which (as well as the regular army) are called into existence by Congress under its constitutional power, "to raise and support armies." The State organizations are made a part of the army of the United States under authority of a different provision of the Constitution, which provides for "calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion." These organizations are usually formed (either by volunteer engagement on the part of the men or by conscription by the State authorities) to serve the State, but the President can call them from the service of the State, into the service of the United States. And sometimes the State organizations are formed (either by volunteer engagement on the part of the men or by conscription by the State authorities) with the purpose in view of their being transferred to the service of the United States (under the call of the President) as soon as the organizations are formed. But under all of these circumstances these militia organizations retain their character of State militia, and yet are at the same time (while in the active service of the United States under a call of the President) a part of the army of the United States, and for general purposes, are considered as belonging to that branch of the United States army known as the "volunteer army"<sup>1</sup> and this, notwithstanding the men may have been conscripted and forced into the State militia organization by the State (to serve the State or to be transferred into the service of the United States), and then called into the service of the United States against their will and under their protest. After State militiamen, called into the United States service by the President, once get into that service, no distinction is made between the two classes on account of the manner in which the State got them into its organization—whether by volunteer engagement or by conscription. All of them are designated as State militia called into the service of the United States. Card 1301, *May, 1895*.

2450. The term "volunteers" is however usually applied to soldiers of a temporary United States army—an army raised and organized and supported and maintained for a limited period by the United

<sup>1</sup> Compare the provisions relating to organization of the "volunteer army," in the act of April 22, 1895.

States independently of any State.<sup>1</sup> This kind of an army the President can not raise and maintain at any time without express authority of Congress. He has a general authority given him by Congress, to call the militia of the States into the United States service whenever it becomes necessary for the purposes mentioned in the statute. But he has not such an authority to engage or employ what are usually called "volunteers." It follows therefore that evidences that they were "called into service" by the President are not so important in the case of volunteers as they are in the case of militia. If it be found that volunteers actually performed service at a time when an act of Congress authorized them to be raised and maintained and employed, their status is usually determined to be that of volunteers. But if there be no statute which authorized them to be raised and maintained and employed at that time, or authorized their recognition since, their claim to a status as volunteers, rather than militia called into the service of the United States, must fall, no matter how often they were paid as such or how much or how long they have been recognized by the executive branch of the Government. Card 1377, *May, 1895*.

2451. The act of Congress approved April 22, 1898, prescribed "that all the regimental and company officers shall be appointed by the governors of the States in which their respective organizations [volunteer] are raised." *Held*, that this included not only the original appointments in such organizations, but appointments to fill vacancies, thereafter occurring. Cards 4084, 4228, *April and June, 1898*.

2452. By G. O. 13, A. G. O., 1899, par. 148, Army Regulations, was extended to officers of volunteers. Sec. 3 of this order is a regulation in aid of a statute, viz., the "act granting extra pay to officers and enlisted men of United States volunteers," approved Jan. 12, 1899, and with A. R. 148, provides a means of determining whether an officer's or soldier's service has been honest and faithful. *Held*, therefore, that when under these regulations a board is appointed, its approved finding should be held conclusive, as should also the decision of the commanding officer when no board has been appointed or applied for.<sup>2</sup> Card 6408, *May, 1899*.

<sup>1</sup> For instances of such "volunteers," see act of May 11, 1898, to provide for a volunteer brigade of engineers, and an additional force of ten thousand men specially accustomed to tropical climates; also sec. 12, of the act of March 2, 1899, for increasing the efficiency of the army and for other purposes.

<sup>2</sup> This opinion was concurred in by the War Department and the following action noted: "Hereafter, in the case of any officer or enlisted man of a volunteer organization that has been mustered out of service a record of 'service not honest and faithful' that has been made against such officer or enlisted man at the time of his discharge, in accordance with paragraph 148, Army Regulations, and section 3, of General Orders No. 13, A. G. O., 1899, will be held to be conclusive. No cancellation, alteration, or amendment of such a record will be made, and all applications for the cancellation, alteration, or amendment of such a record will be denied, regardless of any and all testimony that may be submitted in support thereof, on the ground that the War Department has no lawful authority to review the decision that was made in such a case or to change the record of that decision."

**2453.** A board appointed under the provisions of sec. 14 of the act of April 22, 1898, "to provide for temporarily increasing the military establishment," is not required either by statute or regulation to be sworn or to record the evidence taken. It was evidently intended as a summary proceeding adapted to time of war, and may be regarded as merely in aid of the President's authority in time of war to dismiss an officer without trial. It is doubtful whether in the present state of the law it would be proper to swear the members. The boards appointed under sec. 1, of the act of July 15, 1870 (16 Stats. 318), were sworn but those appointed under the act of July 22, 1861 (12 Stats. 270), were not. Those sections were similar to the one under consideration. Where the proceedings of a board appointed under this later statute did not show that the members were sworn, and did not contain a report of the evidence taken, *held*, the President having approved the report and in accordance therewith discharged the officer, that the discharge was legal. Card 4842, *August, 1898*.

**2454.** The date on which a volunteer officer, appointed by the President, formally accepts his appointment should be considered as the date of the commencement of his military service. No such officer should be recognized as having been in the military service under his appointment because of any service that may have been rendered by him prior to his formal acceptance of that appointment.<sup>1</sup> Card 6644, *June, 1899*.

**2455.** The War Department is merely the custodian of the records of disbanded volunteer organizations. Undoubtedly there were many things which should have been recorded but which were not recorded while the organizations to which the records pertain were still in the service of the United States. This fact however does not by any means justify the Department in undertaking to alter or amend the original records in its custody so as to make them show what it may now be thought they ought to have been made to show originally. If such a procedure were permissible with regard to one subject, such, for instance, as that of charges against the pay of enlisted men, it would be equally permissible with regard to an infinite number of other subjects; and there would be no end to the alterations and amendments to which the records might be subjected in the course of years.<sup>2</sup> Card 9170, *October, 1900*.

<sup>1</sup> See opinion of Atty. Gen., cited in note to § 2447, *ante*.

<sup>2</sup> Under date of March 2, 1889, the Secretary of War held that "a record cannot be altered unless there is express provision of law authorizing such alteration. Where evidence is filed which convinces the officer whose duty it is to report upon a record that the record is not correct, the fact as shown by the record will be stated, followed by a remark showing what in his opinion the correct record should be. It is entirely proper to make a note opposite the record believed to be erroneous, to show what the correct record is, and where the evidence to substantiate the fact may be found. This decision should not be construed to prohibit the correction of errors in a report or record of current or recent date where the officer who made the record makes satisfactory explanation in writing of such erroneous record and authorizes its correction."

## VOTE OF THE COURT.

**2456.** A tie vote upon any proposition submitted to the court is equivalent to a vote in the negative—a majority vote being necessary to a determination in the affirmative—and the proposition is not approved. Where the vote is a tie upon an objection to testimony, the objection is not sustained. Where it is tied upon a certain proposed finding or form of sentence, the same is not adopted. XXXI, 511, 610, *July and August, 1871*; XXXII, 126, *November, 1871*.

## W.

## WAR.

**2457.** *Held*, in a case in which a State judge had discharged a soldier enlisted for the war on the ground that the war had ended, that the Judiciary, even of the United States, would not be empowered to determine, originally, the question whether the war had terminated, but upon such question would properly await and abide by the action of the President or Congress.<sup>1</sup> XVIII, 293, *October, 1865*.

**2458.** The joint resolution of Congress for the recognition of the independence of the people of Cuba demanding that the government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters and directing the President of the United States to use the land and naval forces of the United States to carry said resolution into effect, was approved April 20, 1898; and by the act approved April 25, 1898, it was declared "that war has existed since" April 21, 1898, "including said day." *Held* that the latter date, April 21, 1898, was the day upon which the war with Spain began. Card 5424, *December, 1898*.

<sup>1</sup> It has subsequently been similarly held in repeated cases. See *Phillips v. Hatch*, 1 Dillon, 571; *Senneca v. City Fire Ins. Co.*, 36 Conn., 543; *Conley v. Supervisors*, 2 West Va., 410; *Perkins v. Rogers*, 35 Ill. 124; *Sutton v. Tiller*, 6 Coldw. 595; also *United States v. Anderson*, 9 Wallace, 50, 71.

In the case of *The Protector*, 12 Wallace, 700, it was held by the Supreme Court that the war *began* in all the insurrectionary States, except Virginia and North Carolina, on April 19, 1861, the date of the first "proclamation of intended blockade," and in those two excepted States on April 27th, 1861, the date of the second such proclamation, further that the war *ended* in all the States except Texas on April 2d, 1866, the date of the proclamation declaring the war at an end as to all the other States, and in Texas on August 30th, 1866, the date of the proclamation declaring the war at an end in that State and generally. And see *Adger v. Abston*, 15 Wallace, 555, and *Burke v. Mittenberger*, 19 of 519, in which the ruling in *The Protector* is affirmed by the same court, also *United States v. Anderson*, *supra*.



## WAR POWER.

2459. The war power of the United States is vested in Congress by Art. 1, Sec. 8, pars. 11, 12, 13, 14, 15 and 16, of the Constitution. The President, as Executive and Commander in chief of the Army and Navy, becomes authorized, in time of war, to execute this power under the public acts of Congress initiating and defining the same. An official of a State can no more lawfully exercise any part of such function than can an individual citizen.<sup>1</sup> Thus, where, during the civil war, the governor of a State of his own authority caused to be arrested and confined at hard labor in a chain-gang certain inhabitants of the State suspected of sympathizing with and giving aid to the public enemy—announcing that they would be so confined until certain civilians and military officers, who were residents of such State and had been seized by the enemy, should be released: *held*, that such proceeding was a transcending of the police power of the State and an assumption of an exercise of the *war power* belonging exclusively to the government of the United States, and was therefore unauthorized and illegal. II, 511, *June, 1865*. And similarly *held*, that the seizing and holding by a governor of a State, of certain persons as "hostages," in reprisal for citizens of that State captured by the enemy, was an exercise of the war-making power belonging to the general government and could not be recognized as legal by the Secretary of War. III, 258, *July, 1865*.

## WITNESS.

2460. The rules governing the competency of witnesses before the criminal courts of the United States and the States are, where apposite, generally (though not always necessarily) followed in the practice of courts martial. XXIX, 480, *December, 1869*; XXX, 672, *October, 1870*; XLII, 74, *December, 1878*.

2461. It was heretofore an established rule that accused parties could not legally testify as witnesses before military courts.<sup>2</sup> XXIX, 480, *December, 1869*, 565, *January, 1870*; XXXVII, 624, *June, 1876*.

<sup>1</sup>While "war can alone be entered into by national authority," so "no hostilities of any kind [except in necessary self-defence] can lawfully be practised by one individual of a nation against an individual of any other nation at enmity with it, but in virtue of some public authority." *Talbot v. Janson*, 3 Dallas, 160.

<sup>2</sup>See G. C. M. O. 3, Hdqrs. of Army, 1870, in which is incorporated an opinion of the Judge-Advocate General on this subject. But, now, by the act of March 46, 1878, c. 37, it has been expressly provided that at trials, not only before the courts of the United States but before courts martial and courts of inquiry, "the person charged shall, at his own request, but not otherwise, be a competent witness." It is added: "And his failure to make such request shall not create any presumption against him." But parties testifying under this act have no exceptional status or privileges; they must take the stand and be subject to cross-examination like other witnesses. The submission by the accused of a sworn written statement is not a legitimate exercise of the authority to testify conferred by the statute, and such a statement should not be admitted in evidence by the court. See the General Orders cited in note 2 to § 1300, *ante*.

**2462.** It has been uniformly *held* that the wife of a person on trial before a court martial could not properly be admitted as a witness for or against him;<sup>1</sup> and the statute authorizing accused parties to testify does not affect this rule. XXX, 672, *October, 1870*; XLVII, 521, *September, 1884*. Where a court martial refused to admit in evidence (as being incompetent) the testimony of the wife of the prosecuting witness, *held* that its action was entirely erroneous, no legal objection existing to the competency of such a person. XLIII, 106, *December, 1879*.

**2463.** The president or any member of a court martial, as also the judge-advocate, may legally give testimony before the court. That the court, at the time of a member's testifying, is composed of but five members will not affect the validity of the proceedings, since in so testifying he does not cease to be a member. It is in general, however, most undesirable that the judge-advocate, and still more that a member, should appear in the capacity of a witness, except perhaps where the evidence to be given relates simply to the good character or record of the accused. II, 584, *June, 1863*; VII, 202, *February, 1864*; XI, 299, *December, 1864*; XLII, 472, *January, 1880*.

**2464.** It is no objection to the competency of a witness that he is the officer upon whom will devolve the duty of reviewing authority when the proceedings are terminated. XXXIX, 518, *April, 1878*.

**2465.** It is no objection to the competency of a witness that his name is not on the list of witnesses appended to the charges when served. The prosecution is not obliged to furnish any list of witnesses, but it is the better practice to do so.<sup>2</sup> XXV, 350, *February, 1868*.

**2466.** A person who is insane at the time is incompetent as a witness. An objection, however, to a witness on account of alleged insanity will not properly be allowed, unless sustained by clear proof, a man being always presumed to be sane till proven to be otherwise. XXXIII, 91, *June, 1872*.

**2467.** Except where their testimony will be merely cumulative, and will clearly add nothing whatever to the strength of the defence (see § 275, *ante*), the accused is in general entitled to have any and all material witnesses summoned to testify in his behalf.<sup>3</sup> A prompt obedience to a summons is incumbent upon all witnesses, nor is a com-

<sup>1</sup> Nor will the testimony of the wife of an accused be admissible in favor of or against a party jointly charged with him, where her testimony will be material to the merits of the question of the guilt or innocence of her husband. See *Territory v. Paul*, 2 Montana, 314.

<sup>2</sup> When the list is furnished, the prosecution is not obliged to confine itself to the witnesses specified. The fact that material testimony is given by an unexpected witness may however constitute ground for an application by the accused (under Art. 96) for further time for the preparation of his defence.

<sup>3</sup> See G. O. M. O. 21, 24, War Dept. 1872; do. 128, Hdqrs. of Army, 1876.

manding or superior officer in general authorized to place any obstacles in the way of the prompt attendance, as a witness, of an inferior duly summoned or ordered to attend as such.<sup>1</sup> XXXIII, 100, *June, 1872*; XLIII, 341, *June, 1880*.

2468. In military law an accused party cannot be deemed to be entitled to have a witness summoned from a distance whose military or administrative duties are of such a character that they cannot be left without serious prejudice to the public interests. Art. VI of the Amendments to the Constitution, declaring that the accused shall be entitled "to be confronted with the witnesses against him," applies only to cases before the United States courts.<sup>2</sup> Thus where the offence charged is not capital, and a deposition may therefore legally be taken under the 91st Article of War, the Secretary of War will not in general authorize the personal attendance at the place of trial of a witness whose office or duty makes it necessary or most important that he should remain elsewhere. XIX, 35, *October, 1865*; XXXVIII, 141, *July, 1876*.

2469. An accused party at a military trial can rarely be entitled to demand the attendance, as a witness, of a chief of a staff corps, much less that of the President or Secretary of War,—especially as some minor official can almost invariably furnish the desired facts. If, however, the testimony of one of these officials be found to be necessary or most desirable, and the same cannot legally be taken by deposition, the court, if convened at a distance, may properly be adjourned to Washington or other convenient point, in order that the witness may be enabled to attend without detriment to the public interests. XXXIX, 517, *April, 1878*. (See § 257, *ante*.)

2470. A summons may legally be served either by a military or a civil person,<sup>3</sup> but will in general preferably be served by an officer or non-commissioned officer of the army. A judge-advocate, or a commanding or other officer to whom a summons is sent for service, will not be authorized, by employing for the purpose a U. S. marshal or deputy marshal, or other civil official, to commit the United States to the payment of fees to such official. XLIII, 284, *April, 1880*. The action, however, of a judge-advocate in employing a deputy marshal to serve a summons, where apparently the service could not otherwise be so effectually or economically made, has in a few cases been so far ratified by the Secretary of War as to allow, out of the appropriation for army contingencies, the payment of a small and reasonable account of charges rendered by such official. XXXVII, 570, *May, 1876*.

<sup>1</sup> See G. C. M. O. 18, Dept. of the Platte, 1877.

<sup>2</sup> See note to § 2313, *ante*.

<sup>3</sup> See G. O. 93, Hdqrs. of Army, 1868.

**2471.** There is no fee or compensation established or authorized to be paid, by statute or regulation, for the service of subpoenas for the attendance of witnesses before military courts. Neither a commanding officer nor a judge-advocate is authorized to employ a civil official or any civilian for such service or to commit the United States to the payment of any compensation to such a person. But in a case where the employment of a civilian for such purpose had been resorted to, and it clearly appeared that, to employ him, was the most economical as well as effectual course open to the officer, *advised* that his reasonable compensation be paid out of the appropriation for contingencies of the army. 32, 365, *May, 1889*; 51, 407, *January, 1892*; Cards 428, *October, 1894*; 5549, *December, 1898*.

**2472.** A witness who has given his testimony should in general be allowed to modify the same where he desires to do so in a material particular. But where the court has refused to permit a witness to correct his statement as recorded, such refusal need not induce a disapproval of the proceedings unless it appear that the rights of the accused have thus been prejudiced. VII, 451, *March, 1864*.

**2473.** A witness can have no authority to discharge or relieve himself from attendance on the ground that the testimony desired of him is immaterial, or for any other reason. In the civil practice such an act would be a grave contempt of court. It is for the court to judge as to the materiality or pertinency of the evidence of witnesses; and unless a witness has been determined by the court to be incompetent or his testimony to be inadmissible, he should remain and stand his examination till duly informed by the court or judge-advocate that his attendance is no longer required in the case. XXXIX, 354, *December, 1877*.

**2474.** The privilege, recognized by the common law, of a witness to refuse to respond to a question, the answer to which may criminate him, is a *personal* one, which the witness may exercise or waive as he may see fit. It is not for the judge-advocate or accused to object to the question or to check the witness, or the court to exclude the question or direct the witness not to answer.<sup>1</sup> Where however he is ignorant of his right, the court may properly advise him of the same. XI, 220, *December, 1864*. But where a military witness declines to answer a question on the ground that it is of such a character that the answer thereto may criminate him, but the court decides that the question is not one of this nature and that it must be answered, the witness cannot properly further refuse to respond, and, if he does so, will render himself liable to charges and trial under Art. 62.<sup>2</sup> XXXIV, 242, *April, 1873*.

<sup>1</sup> Compare § 1308, *code*, and note.

<sup>2</sup> See G. C. M. O. 23, War Dept., 1873; also *Brown v. Walker*, 161 U. S., 591.



**2475.** To entitle a witness to the payment of fees, it is not absolutely essential that he should produce a formal summons or subpoena addressed to and complied with by him, or that he should have been formally summoned in the case. It will in general be sufficient if he has duly attended in compliance with a verbal or informal written request from the judge-advocate, or even at the instance of the accused, if this action has been acquiesced in by the judge-advocate.<sup>1</sup> But a party cannot entitle himself to witness fees by merely appearing in court on his own responsibility and not at the instance of either party. XXIII, 196, *August, 1866*; Card 7890, *April, 1900*.

**2476.** Where a party who had attended as a witness before a military court, claimed, in addition to the regular *per diem* compensation, to be indemnified for the loss of time and injury to his business alleged to have been occasioned by reason of his being obliged to attend as such witness; *held* that such claim could not be allowed by the executive branch of the Government; the loss and injury complained of being disadvantages to which citizens were liable to be subjected in the course of the discharge of their obligations to civil society, and for which the law has provided no remedy. XXII, 264, *July, 1866*.

**2477.** *Held* that parties who appeared and testified before, and at the instance of, an officer charged with the preliminary investigation of a case, but were not required to attend at the subsequent trial, were not legally entitled to witness fees. XXI, 463, *July, 1866*.

**2478.** The authority to issue process to compel civilian witnesses to appear and testify, is vested, by Sec. 1202, Rev. Sts., in "every judge-advocate of a court martial."<sup>2</sup> A judge-advocate of an inferior court (see § 1520, *ante*) would thus be empowered for the purpose equally with the judge-advocate of a general court. The present statute, however (unlike the original), does not extend the authority to recorders of courts of inquiry. XXXI, 12, *August, 1870*; XXXIV, 178, *March, 1873*; XXXVII, 283, 316, *January and February, 1876*; XLI, 464, *November, 1878*.

**2479.** To authorize a resort to an attachment there must have been a formal summons, duly issued and served upon the witness, and not complied with. XXXVI, 152, *December, 1874*.

**2480.** *Held* that the statute could not properly be construed as authorizing the issue of an attachment to compel a witness to attend

<sup>1</sup>A strict observance, however, of the Army Regulations would call for the issue of formal summonses or subpoenas to the witnesses on both sides, and it is the better practice for the judge-advocate to cause such to be served in each instance, particularly in the case of civilian witnesses.

<sup>2</sup>The authority being vested exclusively and independently in the judge-advocate, cannot be exercised by the court. The attachment is thus not a writ or process of the court, but simply a compulsory instrumentality placed at the disposition of the judge-advocate as the prosecuting official representing the United States.

before a commissioner or other person and give his *deposition*. XXXVI, 152, *December, 1874*.

2481. A judge-advocate cannot properly direct an attachment to a U. S. marshal or deputy marshal or other civil official. (See § 2470, *ante*.) Some military officer or person should be designated by him, or detailed for the purpose by superior authority.<sup>1</sup> XXVII, 147, *August, 1868*. In executing the attachment, the needful force may be employed. XI, 234, *December, 1864*.

2482. The authority of a court martial to punish as for a contempt, being confined by the code (Art. 86) to cases of acts of menace or disorder committed in its presence, such a court would not be empowered to punish, as being in contempt, a witness appearing before it, whose attendance it had been necessary to compel by process of attachment.<sup>2</sup> IX, 208, 278, *June, 1864*; XXI, 215, *February, 1866*.

2483. The compensation allowed by the Secretary of War for witnesses summoned as *experts* in handwriting before a court martial (see *Smith v. U. S.*, 24 Ct. Cls. 209)—*held* payable out of the annual appropriation "for compensation of witnesses attending upon courts martial and courts of inquiry." 49, 187, *September, 1891*.

2484. *Held* that duly attending by a civilian witness before a duly authorized official to give a *deposition*, to be used in evidence on a military trial, was to be regarded as practically equivalent to attending a court martial, and that the deponent was entitled to be paid the usual allowances (*i. e.*, the same as those of witnesses appearing before the court) out of the regular appropriation for the "compensation of witnesses attending before courts martial,"<sup>3</sup> &c. 51, 468, *January, 1892*.

<sup>1</sup> Upon the subject of the execution of process of attachment in military cases, see the opinion of the Atty. Gen. in 12 Opins., 501; also the directions—based upon the same—of G. O. 93, Hdqrs. of Army, 1868.

Prior to the adoption of the Constitution, Congress (then the Government) appears to have relied upon the State authorities for the necessary process to compel the attendance of witnesses before military courts. See Resolution of Nov. 16, 1779—111 Journals of Congress, 392. In the British law, by a provision first incorporated in the Mutiny Act in the year 1800, witnesses neglecting to comply with a summons requiring their presence at such courts, are made "liable to be attached in the Court of Queen's Bench," &c. This provision well illustrates the close connection between executive and the other governmental powers in the British Constitution, where the Sovereign is a part of the Judiciary as well as of the Legislature. The fact of the express distinction and separation of the three powers in our own organic law, one result of which has been to leave courts martial, as agencies of the executive power, quite independent of any review or control on the part of the U. S. courts (see § 992, *ante*), has also no doubt availed to preclude the devolving upon the Federal tribunals of a power, fitly conferred in the foreign statute, but which, with us, would be exceptional and out of harmony with our constitutional system.

It may be added, in regard to the exercise of the authority to issue compulsory process, as vested in judge-advocates by the act of 1863 (Sec. 1202, Rev. Sts.), that the commission of such exercise have not been frequent in practice, and no case is known in which such authority has been abused.

<sup>2</sup> But by sec. 1 of the act of March 2, 1901, "to prevent the failure of military justice," &c., provision is made for the punishment by civil authority of civilians refusing to appear or testify before general courts martial.

<sup>3</sup> See Circ. 9, A. G. O., 1883.

**2485.** *Held* that the annual appropriation by Congress for the compensation of witnesses attending before courts martial was evidently based upon the understanding that such compensation, not being prescribed by statute, was one left to be fixed by the Secretary of War (the authority charged with the expenditure of the appropriation), and was indeed that which had been so fixed and published in army regulations. Thus the appropriation, made as it is from year to year, is to be regarded as made in knowledge and recognition of the rates of compensation as established by such regulations. Sec. 848, Rev. Sts., prescribing witness' fees, and constituting a part of the chapter entitled "THE JUDICIARY," has reference to such fees in the Federal civil courts only, and has no application whatever to courts martial, which are no part of the judiciary of the United States.<sup>1</sup> 57, 490, *February, 1893*.

**2486.** Neither the appropriation "for the compensation of witnesses" attending military courts, nor the appropriation for the contingent expenses of the army, is applicable to the payment of allowances, as witnesses before *civil* courts, of officers or soldiers of the army or of civil employes of the military establishment. For such allowances they must look to the laws and appropriations fixing and authorizing the payment of witness fees in these courts.<sup>2</sup> 55, 471, and 56, 97, *October, 1892*; Cards 5335, *November, 1898*; 7540, *January, 1900*.

<sup>1</sup>For the existing regulations on the subject of witnesses, see "Attendance of Witnesses," "Fees of Witnesses," and "Examination of Witnesses," Court-Martial Manual (1901), pp. 33-43.

<sup>2</sup>If, however, it is absolutely necessary to furnish them transportation in kind to enable them to appear, as witnesses for the Government, before a *civil court of the United States*, an account of such expenditure, together with the evidence that they were properly subpoenaed and did attend the court, will be forwarded to the War Department for presentation to the Department of Justice. Officers providing such transportation will notify the court, or the marshal thereof, that it was furnished to enable the witnesses to perform the requisite journeys in obedience to the summons. A. R., 72, edition of 1895.





## APPENDIX A.

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### REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL, BY G. NORMAN LIEBER, JUDGE-ADVOCATE GENERAL, U. S. ARMY, 1898.

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## CHAPTER I.

### CLASSIFICATION AND SOURCE OF AUTHORITY OF ARMY REGULATIONS.

The words *regulate* and *regulation* are used in several places in the Constitution of the United States. Thus, Congress has power to "regulate" commerce, to "regulate" the value of money, to make rules for the government and "regulation" of the land and naval forces, to make "regulations" with regard to the elections of Senators and Representatives, to make "regulations" with reference to the jurisdiction of the Supreme Court in certain cases, and to make needful rules and "regulations" respecting the territory and other property of the United States. In all these cases regulation is legislation.

By virtue of its power to make rules and regulations for the land and naval forces, Congress covers a large field of legislation relating to the administration of military affairs. When this is done, there, however, remains a mass of matters appertaining to the military establishment, which it is necessary to "regulate." Legislation can not

enter into all the details of this regulation, and, if it could, it would not be desirable, because a legislative code, controlling the whole subject of military administration, would not have the necessary elasticity. The Constitution provides a way of supplementing this power of Congress, the President, as executive and commander-in-chief of the Army, having the power to make regulations for its government.<sup>1</sup>

The regulations for the transaction of the public duties and business relating to the military establishment, adopted by the President in the exercise of this power, are designated as the Army Regulations. They may be divided into several classes, viz:

1. Those which have received the sanction of Congress. These cannot be altered, nor can exceptions to them be made, by the executive authority, unless the regulations themselves provide for it. In reality, the approval of Congress makes them legislative regulations, and they might therefore be more strictly classified with other statutory regulations with reference to subjects of military administration. They are, however, included under the general head of army regulations, as approved codes of executive regulations. Examples of regulations having this sanction are given *post*.

2. Those that are made pursuant to, or in execution of, a statute—meaning by the latter expression, those that are supplemental to particular statutes, and, in the absence of sufficient legislative regulation, prescribe means for carrying them out. These, if it be not prohibited by the statute, may be modified by the executive authority,<sup>2</sup> but until this is done they are binding as well on the authority that made them as on others. It has been held that a regulation of the Treasury Department, made in pursuance of an act of Congress, "becomes a part of the law, and of as binding force as if incorporated in the body of the act itself."<sup>3</sup> So it has been held that the civil service rules, promulgated under the Civil Service Act, "became a part of the law," and that removal from a position placed under the act and the rules can only be made agreeably to the terms and provisions of both the

<sup>1</sup> "Regulations are administrative rules or directions as distinguished from enactments. They exist in all the Executive Departments and are of very material service in the efficient administration of the Government. Army regulations are authoritative directions as to the details of military duty and discipline. The authority for Army regulations is to be found in the distinctive functions of the President as commander-in-chief and as Executive. His function as commander-in-chief authorizes him to issue, personally or through his military subordinates, such orders and directions as are necessary and proper to insure order and discipline in the Army. His function as Executive empowers him, personally or through the Secretary of War, to prescribe rules, where requisite, for the due execution of the statutes relating to the military establishment." (Winthrop's Abridgment of Military Law, p. 8.)

<sup>2</sup> "The power to establish implies, necessarily, the power to modify or repeal, or to create anew." (United States v. Ehasen, 16 Pet. 302.)

<sup>3</sup> United States v. Barrows, 1 Abbott, 351 Fed. Cases, 14,529).

act and the rules,<sup>1</sup> and an army regulation made pursuant to a provision contained in an act of Congress is of the same force. Examples of regulations of this class are those relating to the examination of enlisted men for commissions, under the act of Congress of July 30, 1892, and the Executive order of March 30, 1898, prescribing limits of punishment.

3. Those emanating from, and depending on, the constitutional authority of the President as commander-in-chief of the Army and as executive, and not made in supplement to particular statutes. These constitute the greater part of the Army Regulations. They are not only modified at will by the President, but exemptions from particular

<sup>1</sup> *Butler v. White*, 83 Fed. Rep., 578. See also *United States v. Wade*, 75 Fed. Rep., 261; *Boody v. United States*, 3 Fed. Cases, 860; *United States v. Webster*, 28 Fed. Cases, 569; *Allen v. Colby*, 47 N. H., 544; *The Thomas Gibbons*, 8 Cr., 421; *Parker v. United States*, 1 P., 203, 207; *United States v. Freeman*, 25 Fed. Cases, 1211; *Lockington's Case*, Bright, 269; *Low v. Hanson*, 72 Me., 104; *United States v. Williams*, 6 Mont., 379; *Cahill v. United States*, 152 U. S., 211, 221. But as to the conclusion in *Butler v. White*, in regard to removals from office under the civil service act and rules, see *post*, p. 718, note.

By act of Congress of March 1, 1828, it was prescribed, "That if any persons shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury." It was held by the Supreme Court that under this legislation the Secretary of the Treasury had the power to make a regulation authorizing justices of the peace of States to administer oaths to affidavits in support of claims, and that perjury might be assigned on an affidavit so taken, (*United States v. Bailey*, 9 Pet., 238). And see *United States v. Breen*, 40 Fed. Rep., 402.

Such regulations must of course be consistent with the law, as is pointed out in the following extract from a report of the Judge-Advocate General's Office, dated November 22, 1888:—

"Paragraph 2454, Army Regulations of 1881, was first promulgated by direction of the Secretary of War on June 22, 1872, in General Orders, No. 51, A. G. O. These orders prescribed rules for the execution of the provisions of the act of Congress approved May 15, 1872 (17 Stat., 116), now embraced in sections 1280-1284, Revised Statutes. Although this statute was silent as to the execution of the details of its provisions, yet as the execution thereof, from the nature of the enactment, required to be specifically methodized, the authority for prescribing rules to effectuate the objects of the law resulted by legal implication in connection with the constitutional duty of the executive department to 'take care that the laws be faithfully executed' (1 *Winthrop*, 19; *McCall's Case*, 2 Phila., 269, 10 *Wheat.*, 42; 7 *Pet.*, 2; 9 *id.*, 238; 1 *Pet.*, C. C., 471; 1 *W. & M.*, 164; 11 *Mich.*, 298; 16 *Wis.*, 423; 5 *Phila.*, 287; 47 *N. H.*, 544; *Cooley's Principles Constitutional Law*, 44, 1 *Opin. Atty. Gen.*, 478; 2 *id.*, 225, 243, 245, 421; 4 *id.*, 225, 227; 6 *id.*, 365; 16 *id.*, 39.)

"It is obvious that the regulations under discussion were made in aid of the law cited and therefore belong to the class of regulations termed by the Court of Claims in its opinion, heretofore mentioned, as 'supplementary to the statutes which have been enacted by Congress in reference to the Army.' But in order that such regulations shall have the force of law, they must, under the authorities cited, be consistent with the statute in aid of which they were made.

"It will appear from the report of this office of October 9, 1888, that paragraph 2454, Army Regulations of 1881, was originally issued under a misapprehension of the intent and effect of the provisions of the act of Congress approved May 15, 1872 (secs., 1280-1284, Rev. Stat.). To make this paragraph consistent with the statute a project for an amendment was submitted and substantially adopted by the Secretary of War by the publication of General Orders No. 35, of November 10, 1888, amending Army Regulation 2454."

See also §§ 496, 499, pp. 140, 141, *ante*.

regulations are given in exceptional cases; the exercise of this power with reference to them being found necessary. "The authority which makes them (regulations) can modify or suspend them as to any case, or class of cases, or generally."<sup>1</sup>

To which are sometimes added:

4. Departmental regulations, made by virtue of the authority conferred by section 161, Revised Statutes, on the head of each department "to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property appertaining thereto."<sup>2</sup>

Mere repetitions of legislative enactments are not included under any of these heads.

<sup>1</sup>5 Dec. First Comptroller, 20, and see art. 1 of Circ. No. 4, 1897, A. G. O.; Circ. No. 2, 1885; United States v. Ehasen, 16 Pet. 302; Davis's Military Laws, 146, and Military Law, 6, 3 Dec. Comp. Treas., 395; Smith v. United States, 24 Ct. Cls., 209; Arthur v. United States, 16 Ct. Cls., 422. Opin. Judge-Advocate General, March 5, 1890, concurred in by the War Department (2074).

The following is an extract from the opinion last cited:

"Regulations may be divided into different classes with respect to this question. There are, or may be, those which have received the sanction of Congress, and it is evident that the Secretary of War would have no authority to make an exception to one of these. There are also those that are made pursuant to and in aid of a statute. These may be modified, but, until this is done, are binding as well on the authority that made them as on others. (United States v. Barrows, 1 Abbott, 51.) There is also a large body of other regulations emanating from, and depending solely on the authority of the President as commander-in-chief. With reference to such regulations, it has, I believe, been sometimes claimed that the same rule should be applied that is applied to the regulations made pursuant to statute. But this has not been done in practice, and I do not think that it should be done, for the reason that it would seem to be an unnecessary, embarrassing and perhaps unconstitutional limitation of the authority of the President as commander-in-chief. To exempt from compliance with a particular regulation in an exceptional case would seem to be a lawful exercise of that authority."

In United States v. Burns, 12 Wall., 246, the Supreme Court held with reference to an army regulation, prohibiting persons in the military service from making contracts for supplies, etc., with other persons in the military service, that the regulation did not apply to contracts on behalf of the United States, which required for their validity the approval of the Secretary of War, that though contracts of that character are usually negotiated by subordinate officers or agents of the Government, they are in fact and in law the acts of the Secretary, whose sanction is essential to bind the United States, and that the Secretary, though the head of the War Department, is not in the military service in the sense of the regulation, but, on the contrary, is a civil officer with civil duties to perform, as much as the head of any other of the executive departments. This decision is sometimes referred to as sustaining the view that army regulations are not in any case binding on the authority that makes them, whereas all that was held is that the regulation in question was not intended to restrain the Secretary of War. (See the case of Smith v. United States, 24 Ct. Cls., 209.)

<sup>2</sup>Section 1059, Revised Statutes, vests the Court of Claims with jurisdiction to hear and determine claims founded upon any regulation of an executive department, which the court has construed as meaning any regulation within the lawful discretion of the head of an executive department. (20 Ct. Cls., 199.)

See also act of March 5, 1887, to provide for the bringing of suits against the Government of the United States."



A long continued practice has been held equivalent to a specific regulation.<sup>1</sup>

<sup>1</sup> *United States v. Macdaniel*, 7 Pet., 1; *United States v. Webster*, 28 Fed. Cases, 515, 3 Comp. Dec., 316.

See also *Martin v. Mott*, 12 W. 19, and *United States v. Ballock*, 24 Fed. Cases, 928.

"A regulation is a rule. It may be written, and no reason is perceived why it may not exist in parol or by usage." (Decision First Comptroller, Vol. V., p. 311.) The "custom of war," that is to say, the custom of the service, is recognized by the 8th Article of War as being a part of the law military.

But usage can not be relied on in justification of an act forbidden by express law. (*Walker v. The Transportation Company*, 3 Wall., 150, *Clark's Browne on Usages and Customs*, p. 27, note; 27 Am. and Eng. Enc. of Law, 798.) A noticeable instance of the disregard of this principle is to be found in a work on "The Military Law of England," published in London in 1810, in which, after stating the law relating to duelling, as contained in the Articles of War, it is said that "there are cases in which, notwithstanding the explicit declarations of the written law, the custom of the service would seem to demand a reference to arms," and, accordingly, "General Rules and Instructions for Seconds in Duels" are given.

"A usage or custom, at military law, must consist of a fixed and uniform practice of long standing, which is not in conflict with existing statute law or regulation. A custom of the service can not be established by proof of isolated or occasional instances, but must be built up out of a series of precedents. It must also be a usage of the Army, or of some separate and distinct branch of the military establishment. Moreover, no illegal or unauthorized practice, however frequent or long continued, can make a usage." (*Winthrop's Abridgment of Military Law*, p. 14.)

In connection with the above classification of Army regulations, see the decision of the Court of Claims in *Maj. William Smith's Case* (23 Ct. Cls., 452), in which the court said:

"The Constitution provides, in Article I, section 8, paragraph 14, that Congress shall have power 'to make rules for the government and regulation of the land and naval forces.'

"It has been argued here and elsewhere that this provision deprives the President of authority to make such rules of his own motion, or even when previously authorized by legislative action, on the ground that the power is exclusive in Congress and can not be delegated; and so that all rules for the government and regulation of the land and naval forces made by the Executive are void and of no effect without the enactment by Congress in the form of approval or otherwise.

"Congress has established rules and articles for the government of the armies of the United States, commonly called 'Articles of War' (act of April 10, 1806, chapter 20, 2 Stat. L., 359, now Rev. Stat., sec. 1342).

"For the making of other and ordinary regulations Congress has from an early day proceeded upon the idea that the power might be delegated to the President, and has passed several acts expressly conferring such authority (act of March 3, 1813, chapter 52, section 5 (2 Stat. L., 819), act of April 24, 1816, chapter 69, section 9 (3 Stat. L., 298), act July 15, 1870, chapter 294, section 20 (16 Stat. L., 319; act of March 1, 1875, chapter 115 (1 Sup. Rev. Stat., 149), and the act of June 23, 1879, chapter 35, section 2 (1 Sup. Rev. Stat., 494), under which the edition of 1881 was published).

"Congress has three times recognized or approved existing regulations:

"1. The act of April 24, 1816, chapter 69, section 9 (3 Stat. L., 298), provided that 'the regulations in force before the reduction of the Army be recognized, as far as the same shall be found applicable to the service, subject, however, to such alterations as the Secretary of War may adopt, with the approbation of the President.'

"2. The act of March 2, 1821, chapter 13, section 14 (3 Stat. L., 616), enacted 'that the system of "general regulations for the Army" compiled by Major-General Scott shall be, and the same is hereby, approved and adopted for the government of the Army of the United States and of the militia, when in the service of the United States.' This section was unconditionally repealed by the act of May 7, 1822, chapter 88 (3 Stat. L., 636). As to this act Attorney General Wirt advised that, notwithstanding such repeal, the regulations having received the sanction of the President, continued in force by the authority of the President in all cases where they did not conflict with positive legislation. (1 Opin., 549.)

"3. The act of July 28, 1896, chapter 209, section 37 (14 Stat. L., 337, 338),

As to the subject-matter of regulations for the government of the Army, no distinct line can be drawn separating the President's consti-

required the Secretary of War to prepare a code of regulations for the government of the Army, and enacted 'the existing regulations to remain in force until Congress shall have acted on said report.' No such action has been taken.

"It is well settled that Army regulations when directly approved by Congress have the absolute force of law equally with other legislative acts until repealed by the same power. Congress so treated them when it passed the act of June 8, 1872, chapter 348 (17 Stat. L., 337), providing that the fifth section of the act of May 8, 1872 (17 Stat. L., 83), should not be held to repeal that part of paragraph 1030 of the Revised Army Regulations of 1863 with which it appeared to be in conflict, thus recognizing the regulations approved by Congress in that year as having the same force as Congressional enactments.

"On the other hand, it is just as well settled that regulations not so approved have the force of law only when founded on the President's constitutional powers as commander-in-chief of the Army, or are 'consistent with and supplementary to the statutes which have been enacted by Congress in reference to the Army.' *Symond's Case*, 120 U. S., 46, affirming 21 Cl. Cls., 151; *Reed's Case*, 100 U. S., 22; *Smith v. Whitney*, 116 *id.*, 180; *United States v. Whitney*, 120 *id.*, 47; *Wayman v. Southard*, 10 Wheat, 43; *United States v. Ehasen*, 16 Pet., 291; *United States v. Freeman*, 3 How., 556; *Kurtz v. Motitt*, 115 U. S., 503; *United States v. Webster*, 2 Ware, 60; *United States v. Maurice*, 2 Brock, 103; *Ferren's Case*, 3 Benedict, 447; *Gates v. Fletcher*, 1 Minn., 204; 1 Opin. Atty. Gen., 469, 547; 2 *id.*, 225; 3 *id.*, 85; 6 *id.*, 10, 215, 365; 10 *id.*, 415; 16 *id.*, 38.)

"Whether a regulation, the validity of which is drawn in question, is within the constitutional power of the President to promulgate, or whether it has been approved by Congress, or whether it 'is consistent with and supplementary to the statutes,' are judicial questions not always free from difficulties of determination.

"In the light of these views and the adjudicated cases we shall examine the existing regulations.

"The present regulations are contained in the edition of 1881, published under authority of the act of March 1, 1875, chapter 115 (1 Sup. Rev. Stat., 140), which directs the President 'to make and publish regulations for the government of the Army in accordance with existing laws,' and under the act of June 23, 1879, chapter 35, section 2 (1 Sup. Rev. Stat., 494), which further directs the President to 'cause all the regulations of the Army and general orders now in force to be collated and published to the Army,' and provides for the expenses of the work.

"As promulgated in this edition they contain orders and regulations of four different classes intermingled. At the end of each the earlier authority for it is specified by a note in brackets.

"1. General orders which he (the President) has a right to issue under his constitutional prerogative of 'commander-in-chief of the Army and Navy of the United States.' (Constitution, Art. II, sec. 2, par. 1.)

"2. Departmental regulations, under section 161, Revised Statutes, authorizing the head of each department to 'prescribe regulations, not inconsistent with law, for the government of his department, the conduct of officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property appertaining thereto.'

"3. Regulations not approved by Congress, but made by the President in the exercise of legislative authority conferred by the acts above cited.

"4. Regulations expressly approved by Congress."

The executive regulations of the British military administration consist, principally, of the Rules of Procedure, the Queen's Regulations, Royal Warrants, and Orders in Council. The Rules of Procedure are authorized by the Army Act, and prescribe the regulations for the formation of military courts, the trial of offenders, and the execution of sentences; the Queen's Regulations relate to the interior economy of corps, the maintenance of discipline, and the powers and duties of commanding officers, and supplement the Army Act as to offenses against enlistment and the disposal of prisoners; Royal Warrants prescribe the permanent regulations as to the government, discipline, pay, promotion, and conditions of service; and Orders in Council are regulations made by the Crown with the advice of the Privy Council, in regard to matters of great importance, such as the duties of the military when on board public ships, the duties of the office of commander-in-chief and other great

tutional power to make them from the constitutional power of Congress "to make rules for the government and regulation" of the land

military offices, etc. Royal Warrants, General Orders (affecting duty, discipline, and general efficiency), and amendments of the Queen's Regulations, are published in Army Orders. Besides the above there are separate regulations for the Militia, Yeomanry, and Volunteer Forces. (Pratt's Military Law, London, 1892; Gunter's Outlines of Military Law, 1897.)

Until toward the close of the last century there appears to have been no authorized system of general army regulations in existence in England, each colonel having his own standing orders for the discipline and exercise of the regiment, so that "there was not any standard of uniformity or of efficiency by which progress in the military art could be tested" (Clode's Military and Martial Law, 2d ed., p. 55). In 1788 "A Collection of Regulations and Orders" was issued, and this seems to have been the first authoritative issue of such a system. The war-office regulations were collected and issued in 1807, and the "General Regulations and Orders for the Army, Adjutant General's Office, Horse Guards," in 1811. A collection of army regulations by Thomas Simes was published in 1772, under the title, "The Military Guide for Young Officers," but this publication had no official sanction.

By the term "system of army regulations" is meant an authorized publication, such as our Army Regulations, consisting of general rules, made by the executive authority, for the government, interior economy, and instruction of the army, and the administration of its affairs. The most noted executive regulations of the British military service, which, within a less comprehensive, but most important field, were indeed a very complete system, were the Articles of War, which, before the enactment of the army discipline act of 1879, constituted, together with the mutiny act, the code of discipline by which the British army was governed. The sovereign still has under the Army Act, power to make Articles of War, but, owing to the elaborateness of the statutory code, it is regarded as improbable that the exercise of this power, for the purpose of prescribing the punishments for military offenses, will ever again be necessary. For a short, but very good, sketch of the history of this law-making by prerogative and by executive regulation authorized by statute, see Encyclopædia Britannica, title "Military Law." In 1686 a work entitled "An Abridgment of the English Military Discipline" was published. It consisted principally of drill regulations, but also related to encamping, garrisons, guards, and "councils of war or courts-martial." Some interesting regulations of the time of Queen Anne, recently discovered in the record office of the British Museum, are published in the Journal of the Military Service Institution for November, 1897.

The Rules of Procedure are authorized by the Army Act, in the following terms:

"1. Subject to the provisions of this act Her Majesty may, by rules to be signified under the hand of a secretary of state from time to time make, and when made repeal, alter, or add to, provisions in respect of the following matters or any of them; that is to say,

- (a) The assembly and procedure of courts of inquiry;
  - (b) The convening and constituting of courts-martial;
  - (c) The adjournment, dissolution, and sittings of courts-martial;
  - (d) The procedure to be observed in trials by court-martial;
  - (e) The confirmation and revision of the findings and sentences of courts-martial, and enabling the authority having power under section 57 of this act to commute sentences to substitute a valid sentence for an invalid sentence of a court-martial;
  - (f) The carrying into effect sentences of courts-martial;
  - (g) The forms of orders to be made under the provisions of this act relating to courts-martial, penal servitude, or imprisonment.
- (h) Any matter in this act directed to be prescribed;
- (i) Any other matter or thing expedient or necessary for the purpose of carrying this act into execution so far as relates to the investigation, trial, and punishment of offenses triable or punishable by military law:

"2. Provided always, that no such rules shall contain anything contrary to or inconsistent with the provisions of this act.

"3. All rules made in pursuance of this section shall be judicially noticed.

"4. All rules made in pursuance of this section shall be laid before Parliament as soon as practicable after they are made, if Parliament be then sitting, and if Parliament be not then sitting, as soon as practicable after the beginning of the then next session of Parliament."



forces. Regulations are, when they relate to subjects within the constitutional jurisdiction of Congress, unquestionably of a legislative character, and if it were practicable for Congress completely to regulate the methods of military administration, it might, under the Constitution, do so. But it is entirely impracticable, and therefore it is in a great measure left to the President to do it. So far as Congress chooses to exercise its jurisdiction in this respect it occupies the field, and the President can not encroach on it.<sup>1</sup> But when it does not see fit to do so, the President's power is of necessity called into action. It is, indeed, of the commonest occurrence for Congress to regulate a subject in part and for the Executive to regulate some remaining part, and this without any pretense of statutory authority, but upon the broad basis of constitutional power. We thus have a legislative jurisdiction and, subject to it, an executive jurisdiction extending over the same matter.<sup>2</sup> It could not be otherwise. Congress can not regulate all the details for the execution of all the laws, and the authority charged with their execution must therefore come to its aid.<sup>3</sup>

<sup>1</sup> 2 Opin. Atty. Gen., 231, 6 *id.*, 10, 215.

<sup>2</sup> The War Department has recognized this by its approval of the following views: "The issue of duplicate discharges, or certificates in lieu of lost discharges is a matter over which both Congress and the President have control, the former by virtue of the power 'to make rules for the government and regulation of the land and naval forces,' and the latter by virtue of his power as executive and commander-in-chief. The power of Congress is, however, the superior power, and therefore nothing in conflict with any regulation on this subject made by Congress can legally be prescribed by the President, but the fact that Congress has made a regulation partly covering the subject does not take away from the President his power to make a regulation relating to the part not covered."

<sup>3</sup> Winthrop's Military Law, p. 20, note.

"If it is difficult," says Judge Cooley, "to point out the precise boundary which separates legislative from judicial duties, it is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed; and the performance of many duties which they may provide for by law they may refer either to the chief executive of the State or, at their option, to any other executive or ministerial officer, or even to a person specially named for the duty. What can be definitely said on this subject is this: That such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature can not require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he can not be excused by law. But other powers or duties the executive can not exercise or assume except by legislative authority, and the power which in its discretion it confers it may also in its discretion withhold, or confide to other hands. Whether in those cases where power is given by the constitution to the governor, the legislature have the same authority to make rules for the exercise of the power that they have to make rules to govern the proceedings in the courts, may perhaps be a question. It would seem that this must depend generally upon the nature of the power, and upon the question whether the constitution, in conferring it, has furnished a sufficient rule for its exercise. Where complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations; but where the governor is made commander-in-chief of the military forces of the State, it is obvious that his authority must be exercised under such proper rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department. There would be this clear limitation



So, also, as between the legislative and judicial powers, Congress may regulate the procedure of the Federal courts, but in so far as it does not do it the courts may prescribe their own regulations. And this is in fact the existing condition. Congress has exercised the power in part, leaving it to the courts to regulate what it has not provided for. Courts can not exercise their jurisdiction without rules of procedure, and necessarily have the original power of adopting their own when the legislature does not prescribe them; just as the President can not exercise his power as commander-in-chief without the power to make orders for the regulation of the Army. In fact, each branch of the Government—the legislative, executive, and judicial—has the original power of making regulations for the transaction of its business—most manifestly so when the business is of direct constitutional origin—but the legislative has sometimes a jurisdiction over the regulations of the other branches, and when this happens its jurisdiction is superior.<sup>1</sup>

In speaking of the power of Congress over the administration of the affairs of the Army, it is, of course, not intended to include what would properly come under the head of the direction of military movements.<sup>2</sup> This belongs to command, and neither the power of Congress to raise and support armies, nor the power to make rules for the government and regulation of the land and naval forces, nor the power to declare war, gives it the command of the Army. Here the constitutional power of the President as commander-in-chief is exclusive.

When Congress fails to make regulations with reference to a matter of military administration, but either expressly or silently leaves it to the President to do it, it does not delegate its own legislative power to him, because that would be unconstitutional,<sup>3</sup> but expressly or silently

upon the power of the legislature to prescribe rules for the executive department; that they must not be such as, under pretense of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers. These matters which the constitution specifically confides to him the legislature can not directly or indirectly take from his control." (Cooley's Constitutional Limitations, p. 123.)

<sup>1</sup> Under the Constitution, each house of Congress determines its own rules of proceedings.

<sup>2</sup> Fleming v. Page, 9 How., 615.

<sup>3</sup> In *McCall's Case*, 2 Philad., 269, the court said "Of course Congress can not constitutionally delegate to the President legislative powers; but it may, in conferring powers constitutionally exercisable by him, prescribe, or omit prescribing, special rules of their administration, or may specially authorize him to make the rules. When Congress neither prescribes them nor expressly authorizes him to make them, he has the authority, inherent in the powers conferred, of making regulations necessarily incidental to their exercise, and of choosing between legitimate alternative modes of their exercise. Whether his authority extends further, and enables him, without express authority from Congress, to make regulations which, though incidental, are not necessarily so, is a different question. When, however, Congress, in conferring a power which it may constitutionally vest in him, not only omits to prescribe regulations of its exercise, but, as in the present case, expressly

gives him the opportunity to call his executive power into play. It is perhaps not easy to explain why, if regulations may, under the Constitution, be made both by the legislative and executive branches, one should have precedence over the other; but it is to be noticed that the power of Congress is the express one "to make rules for the government and regulation of the land and naval forces," whereas the power of the President is a construction of his position as executive and commander-in-chief. The legislative power, by the words quoted, covers the whole field of military administration, but it is not always certain how far the executive power may go. It is not as well defined as the legislative power, but it is undoubtedly limited to so much of the subject as is not already controlled by the latter.<sup>1</sup> The jurisdiction of the executive power is not, however, within this limit coextensive with that of the legislative power, because the legislative branch of the Government has a constitutional field of operation peculiar to itself, and yet there are army regulations which seem to be of a legislative character. It is because of this that difficulty sometimes occurs—a difficulty which has in the past quite often taken the form of a difference of views between the War Department and the accounting officers of the Treasury.

authorizes him to make them, he may, within the limits of, and consistently with, the legislative power declared, make any such regulations incidental, though not necessarily so, to the power conferred, as Congress might have specially prescribed."

"When statutes confer powers, impose duties, and provide for the accomplishment of various objects, they are necessarily couched in general terms, but they carry with them, by implication, all the powers, duties, and exemptions necessary to accomplish the objects thereby sought to be attained." (*In re Neagle*, 39 Fed. Rep., 831.)

"The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law, but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." (*Wayman v. Southard*, 10 W., 46, Marshall, C. J.)

<sup>1</sup>See opinion of Attorney General Wirt, 1 Opin., 549; of Attorney General Berrien, 2 Opin., 225, and of Attorney General Cushing, 6 Opin., 10, 15. "The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with *Gratiot v. United States*, 4 How., 80, and *Ex parte Reed*, 100 U. S., 13, upon which the Government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by Congress, the court observed that they had the force of law. See also *Smith v. Whitney*, 116 U. S., 181. In neither case, however, was it held that such regulations, when in conflict with the acts of Congress, could be upheld." (*United States v. Symonds*, 120 U. S., 46-49.) And see Winthrop's Military Law, pp. 29, 30, and note, and § 494, p. 140, *ante*.

## CHAPTER II.

## EXECUTIVE REGULATIONS IN GENERAL.

Before further considering the regulations relating to one branch—the military branch—of the public service, it will perhaps not be uninteresting briefly to examine the subject of executive orders and regulations in general.<sup>1</sup> There is an important distinction which should be kept in mind in this connection, namely, the distinction between offices created by statute and those created by the Constitution. As to the former, the extent of their authority and the manner of its exercise are subject to the control of the legislative branch; but as to an office created by the Constitution, and whose general powers are named in it, and which is not by the Constitution made dependent on legislation for its jurisdiction, its authority can not, as to these constitutional powers, be thus controlled, except in so far as the legislative branch may refuse to vote the means or furnish the opportunity necessary for their exercise, or unless the Constitution itself vests the legislative branch with a superior authority as to some subject-matter over which both it and the executive or judicial branch have jurisdiction. When Congress, by its exercise of the legislative power, creates new subjects of political action, it may, for the execution of the laws relating to them, vest the President with new powers; but where the President is vested with a distinct power by the Constitution, Congress can not control it otherwise than as indicated.<sup>2</sup>

In the *Neagle Case* (39 Fed. Rep. 833) the United States circuit court

<sup>1</sup> See article on "Executive Regulations" in the *American Law Review*, November-December, 1897.

<sup>2</sup> "The theory of the Constitution undoubtedly is, that the great powers of the Government are divided into separate departments, and so far as these powers are derived from the Constitution, the departments may be regarded as independent of each other. But beyond that all are subject to regulations by law, touching the discharge of the duties required to be performed.

"The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly can not be claimed by the President.

"There are certain practical duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress can not impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character." *Kendall v. United States*, 12 Pet., 610.

said: "The power and duty imposed on the President to 'take care that the laws are faithfully executed,' necessarily carries with it all power and authority necessary to accomplish the object sought to be attained." And on the appeal of this case the Supreme Court (135 U. S., 63) said: "The Constitution, section 3, Article II, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'

"Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution?"

And the court, Mr. Justice Miller delivering the opinion, then give a number of examples of proper occasions for the exercise of this executive power, and conclude that, while there is no express statute authorizing the appointment of a deputy marshal, or any other officer to attend a judge of the Supreme Court when traveling in his circuit, and to protect him against assaults or other injury, the general obligation imposed upon the President of the United States by the Constitution to take care that the laws are faithfully executed, and the means placed in his hands, both by the Constitution and the laws of the United States, to enable him to do this, impose upon the executive department the duty of protecting a justice or judge of any of the courts of the United States, when there is just reason to believe that he will be in personal danger while executing the duties of his office.

In *Wilcox v. Jackson* (13 Pet., 498), the Supreme Court held that the President could legally set aside public lands for a military post or Indian agency, in the execution of laws authorizing him to establish them at such places as he might deem best, but not expressly



authorizing him to reserve public lands. And in *Grisar v. McDowell* (6 Wall., 381), the same court call attention to the fact that from an early period in the history of the Government it had been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses, his authority in this respect being recognized in numerous acts of Congress. Thus, in the Preemption Act of May 29, 1830, it was provided that the right of preemption contemplated by the act should not "extend to any land which is reserved from sale by act of Congress, or *by order of the President*, or which may have been appropriated for any purpose whatever." Again, in the Preemption Act of September 14, 1841, "lands included in any reservation by any treaty, law, or *proclamation of the President*, or reserved for salines or other purpose," were exempted from entry. So by an act of March 3, 1853, it was declared that all public lands in California should be subject to preemption, and offered at public sale, with the exception, among others, "of lands *reserved by competent authority*," and the court say that by "competent authority" was meant the authority of the President and officers acting under his direction. As to the reservations then in question the court say that they were indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them. And in the case of *Swain v. United States*,<sup>1</sup> it has been finally settled that the President, as commander-in-chief, has the constitutional power to convene courts-martial—a striking illustration of an undefined constitutional power, for it is nothing less than the power to constitute tribunals with judicial jurisdiction extending even to trials for capital offences.

The President, said Mr. Cushing, "is limited in the exercise of his powers by the Constitution and the laws; but it does not follow that he must show a statutable provision for everything he does. The Government could not be administered upon such a contracted principle. The great outlines of the movements of the Executive may be marked out, and limitations imposed upon the exercise of his powers, yet there are numberless things which must be done, which can not be anticipated and defined, and are essential to useful and healthy action of government."<sup>2</sup>

<sup>1</sup> 165 U. S., 553.

<sup>2</sup> 6 Opin. Atty. Gen., 365. See, also, *id.*, 10; 8 *id.*, 343; 10 *id.*, 413.

In *United States v. Macdaniel* (7 Pet., 14), the Supreme Court said: "A practical knowledge of the action of any one of the great departments of the Government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for every thing he does. No government could be administered

It is well established that "the Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such, be binding upon all within the sphere of his legal and constitutional authority."<sup>1</sup>

So that if section 161 of the Revised Statutes, above mentioned, can be said to have any reference to the administration of military affairs, it would seem to be to this extent unnecessary, the President already having the constitutional authority to prescribe regulations for this purpose through the Secretary of War.<sup>2</sup> An act of Congress, professedly conferring on the President the power to do an act which he already may do by virtue of his constitutional authority, is no more than a declaration of the existing power. But the Secretary of War does not hold an office created and defined by the Constitution. His office is a statutory one, and its authority is subject to the control of Congress, except in so far as his acts are acts of the President, in the exercise of a constitutional function, in a matter over which Congress has not a superior constitutional power. Therefore, section 161 of the Revised Statutes may be regarded as conferring the authority described directly on him as one of the heads of departments referred to, and this is not to be regarded as a delegation of legislative power; a distinction, although not a well-defined one, existing between those important sub

on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government. Hence, of necessity usages have been established in every department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future."

In *Cahill v. United States* (152 U. S., 211), the Supreme Court, through Justice Brewer, said: "The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is intrusted to either of the principal departments of Government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

<sup>1</sup>*United States v. Mason*, 16 Pet., 302; *United States v. Fletcher*, 148 U. S., 81. *Opinion of Attorney General Cushing*, 7 Opns., 453. The latter is an especially full and interesting discussion of this point. See, also, § 2294, p. 644, *infra*, and notes.

<sup>2</sup>6 Dec. First Comptroller, 13.

jects which must be entirely regulated by Congress and those of less interest, in reference to which a general provision is made and power is given to those who may act under it to fill up the details as incidental to its execution. This matter is fully discussed in *Griner's case*, 16 Wis., 447.<sup>1</sup> But the regulations which the Secretary of War is thus empowered to make are purely departmental regulations for the transaction of the departmental business of the War Department. They are not Army regulations proper.

Regulations made pursuant to, or in execution of, statutes are very common. (See title "Regulations," in the index of the Revised Statutes; and see the opinion of Mr. J. M. Dickinson, Acting Attorney General, dated October 24, 1896, 21 Opins., 431.)

In the case of the *United States v. Breen*<sup>2</sup> the constitutionality of such regulations, made pursuant to legislation declaring any violation of them a misdemeanor and punishable by fine and imprisonment, was fully recognized. In that case Mr. Justice Lamar said:

"The only ground relied upon in behalf of the defendant is, that the authority conferred by the act of Congress on the Secretary of War to make and promulgate said rules and regulations is legislative, and can not, under the Constitution of the United States, be, by act of Congress, conferred upon the Secretary of War or anyone else, so as to make a violation thereof a crime against the United States. Whether this is so or not is the only question to be determined.

"If the law empowered the Secretary of War, by rule or regulation, to make a certain act criminal, and punishable as such, then this prosecution would not be maintainable; but it is not the rule and regulation which declares the violation thereof a crime, and punishable. All that the Secretary is authorized to do is to make the rule and regulation. It is the act of Congress which declares that the unlawful and willful violation of such rule and regulation, after it is promulgated, shall be held a misdemeanor by the person violating the same, and that such person shall be sentenced to pay a fine not exceeding \$500, and shall suffer imprisonment not exceeding six months as a penalty therefor. Numerous acts of Congress have been passed authorizing the Postmaster General, and other members of the executive department, to make rules and regulations for the business pertaining to their respective departments, and declaring that, when made and promulgated, a willful and unlawful violation of them should be held a crime against the United States, and the violators punished as prescribed in the act. The Supreme Court of the United States is authorized by act of Congress to adopt certain rules for the govern-

<sup>1</sup> See, also, *United States v. Webster*, 2 Ware, 46 (Fed. Cases, 16,058).

<sup>2</sup> 40 Fed. Rep., 402.

ment of the inferior courts, which, when made, have the force and effect of law as much as if such rules were directly enacted by Congress, and approved by the President. The same effect is to be given to the rule and regulation made by the Secretary in this case. The act of Congress denounces the violation of it as a crime, and prescribes the penalty. The criminality of the violation of the rule, and the liability of the offender to indictment and to punishment upon trial and conviction, result directly and exclusively from the legislation of Congress."<sup>1</sup>

<sup>1</sup> In *Wood v. Gary*, Mr. Justice Cox of the Supreme Court of the District of Columbia, said:

"If an act of Congress, presumed to be approved by the President, vests in the judges or heads of departments authority to appoint subordinate officers, then, by constitutional authority, the power to appoint them is taken away from the President and it follows, according to this case, that the power of removal would be equally taken away. The President might dismiss the head of a department who would refuse at his request to dismiss a subordinate or inferior officer, but would have no power directly to dismiss such officer himself.

"It may be regarded, then, as the settled law that the power of removal is incident to the power of appointment, and, therefore, that any law which confers upon the head of a department a power of appointment, *ipso facto*, conveys a power of removal, as effectually as if that power were expressly given by the statute. The power of removal is intrenched in the law. It is created by an act of legislation, and it can only be taken away or modified by similar authority. The acts of Congress, therefore, authorizing the appointment of complainant as inspector of mails, of themselves gave the Postmaster General authority to remove him at pleasure, unless that or some other act of Congress has imposed some limitation, condition, or restriction upon that power.

"And this brings us to the inquiry whether and how far, if at all, the act of January 16, 1883, commonly known as the Civil Service Act, affects the power of removal at pleasure which the Postmaster General would possess under his general authority to appoint this class of officers. It does, indeed, very materially modify the power of appointment theretofore existing, but it does not purport to affect the power of removal except in a single particular.

"In section 13 it provides that 'No officer or employee of the United States mentioned in this act shall discharge or promote or degrade, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten to do so, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.'

"Substantially the same is directed to be provided by rules, to be established by the Commission, and the President, in clause 3 of the second section. In no other single respect is the power of removal affected by any substantive and direct enactment of this law.

"But it is claimed that the Commission is empowered to prepare rules in aid of the President for carrying this act into effect, and that said rules, when prepared and promulgated, have the force and effect of law, and that such effect is to be given to the rules under which the complainant seeks relief.

"There can be no doubt as to the power of Congress or any other legislative body to delegate to subordinate authorities the power to make rules and regulations within certain limits, which, when made, will have the force of law. Thus, corporations, municipal or private, may be authorized to make by laws, and police commissioners, boards of health, and fire commissioners may be authorized to make regulations which have the effect of laws.

"But if any rule prepared by this Commission, whether published by the President or not, should have the effect of repealing or modifying an act of Congress, it would be an act of legislation, and not a regulation of a mere executive character, which it was clearly the object of this law to authorize. It is a grave question whether Congress could delegate to the President, or to any board of commissioners, jointly with the President, the authority to do any act which is equivalent to legislation.

"I am not aware that the Supreme Court has made any delivery upon this ques-



But it is not necessary to give further examples of regulations made

tion, but there is a uniform current of authorities in the State courts against the power of any legislature so to delegate their authority. See the authorities collected in the American and English Encyclopedia of Law, volume 3, page 698, under the proposition.

"It is an established proposition of constitutional law that the power conferred upon the legislature to enact laws cannot be delegated by that department to any other body or authority."

"One illustration was the case of a statute of Minnesota which left it to certain judges to decide whether a law should be submitted to the people. *State v. Young*, 29 Minn., 474; and another was a law which conferred upon the district court the power to incorporate towns (*People v. Nevada*, 6 Cal., 143; *State v. Simons*, 32 Minn., 540; both of which forms of legislation were held unconstitutional.

"But probably all courts would agree that no law is to be construed so as to amount to a delegation of legislative authority that can be avoided. An illustration of this rule is found in the case of *Interstate Commerce Commission v. Railway Company* (167 U. S., 479). The Interstate Commerce Act required that all charges on railroads should be reasonable and just, and every other was declared to be unlawful. It prohibited discrimination, undue preferences, etc. It created the Interstate Commerce Commission, gave it authority to inquire into the management and business of all common carriers, and added: 'And the Commission is hereby authorized to execute and enforce the provisions of this act.'

"Under this authority, the Interstate Commerce Commission undertook, by an order, to establish a schedule of rates for certain railroad companies, and, upon the refusal of the latter to observe them, applied to the circuit court for the southern district of Ohio for a mandamus to enforce their order, and, this being refused, appealed to the court of appeals, and the latter court certified to the Supreme Court of the United States the question whether the Commission had the jurisdictional power to make the order before mentioned. Justice Brewer, in delivering the opinion of the court in the negative, said, in construing the act of Congress: 'The power given is the power to execute and enforce, not to legislate. The power is partly judicial, partly executive and administrative, but not legislative.'

"Again

"We have therefore, these considerations presented. First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it can not be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future."

"And so, with equal emphasis, it may be said that the authority to the Civil Service Commission to aid the President in preparing rules for carrying the act creating that Commission into effect, does not by implication confer upon the President a right to virtually repeal an existing law, especially when, as we shall see, that is not at all necessary to the effectual operation of the act itself. And lastly, there is nothing in the language of the act or the objects which it professes to attain which make it necessary to attribute such executive power to the Commission or the President. The act nowhere requires that the power of removal vested in the head of a department shall be abridged except in the single particular of removal, because of the refusal to contribute for partisan purposes, and therefore it is not necessary, in order to carry the act into effect, that any rule should be adopted abridging the power of removal of the Postmaster General or other head of a department in any other respect."

"The second section contains an enumeration of the objects for which the rules

pursuant to, or in execution of, statutes. They are to be met with

are to provide. They are. For competitive examination, for appointment by selection from those grades highest as the result of such examinations, for apportionment of the appointments among the States and Territories and the District of Columbia, according to population, for a period of probation before absolute appointment, for exemption of persons in the public service from any obligation to contribute to any political fund and from being coerced into any political action, and for noncompetitive examination in certain cases, and for notice to the Commission of all appointments made by the appointing power.

"It would be a very irrational interpretation which would give to the words 'and among other things,' which are prefixed to this enumeration, such a scope of meaning as to convey by implication an unlimited authority to establish rules having no relation to the objects of the law. If that were a proper interpretation of the law, these rules might be made to impose new conditions to the power of appointment, and even take it away from the heads of departments and vest it in the Commission itself. The absurdity of such a proceeding would be manifest, and yet it would be no more obnoxious to criticism than rules modifying the power of removal, as it existed before the act was passed, or in a manner not warranted by the law itself.

"The law seems to contemplate the preparation of these rules as the joint act of the Commission and the President. It directs that when promulgated they shall be observed by all the officers in the departments. It does not in terms declare by whose authority they are to be promulgated and to go into effect, but it is to be presumed that it is to be by the President. It makes no difference, however, whether they are to emanate from the President or the Commission, for Congress is just as incapable of surrendering its legislative authority to the President as to the Commission, and is just as little to be understood as intending to do so in the one case as in the other. The simple inquiry is whether the rules invoked by the complainant, whether the President or the Commission, or both, be the authors of them, are such as the act of January 16, 1883, known as the Civil Service Act, authorized to be established. In my judgment they are ultra vires and void.

"I have no doubt that the President may lay down rules for the internal policy of his Administration, and may require his chief executive officers, dependent upon his pleasures for their tenure of office, to conform to them, or else to sever their official relations with him, and in that sense the rules relied on by the complainant were within his political and executive authority. But the enforcement of such rules is a matter between the President and his Cabinet, and not a matter for the courts, or one in which the complainant has any legal interest. All that I mean to state in this opinion is that the rules in question were not such as the Civil Service Act authorizes, and do not derive any efficacy from that act.

"I know of nothing more important to the true interests of the country than the policy which the civil-service legislation was intended to initiate and promote and it is perhaps a matter for great regret that the act of January 16, 1883, has not gone further than it does. But it is my duty to construe it as it is.

"To sum up, I conclude that, apart from the Civil Service Act, the Postmaster General had the authority to remove the complainant from office at his pleasure, that this act makes no change in this respect, except to forbid removals for refusal to contribute to partisan objects; that the power to the Commission and the President to establish rules to carry that act into effect does not authorize any rule which shall make a change in the law in this respect, and that even if this court had jurisdiction in a case like the present, the complainant is not entitled to the relief prayed."

In *Carr v. Gordon*, 82 Fed. Rep., 379, it was said with reference to a civil service rule:

"But on July 27, 1897, the President of the United States promulgated an order announced as an amendment to rule 11, as follows: 'No removal shall be made from any position subject to competitive examination except for just cause, and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense.' This is an authoritative expression by the Executive of the United States of his desire and command to his subordinates with respect to removal from office of those coming within the scope of the civil service regulations. Possessed by the Constitution of the power of appointment and removal, except, possibly, as he may be therein restricted by act of Congress, the Executive has the right to regulate for himself the

throughout our political system, and are a necessary part of its machinery.<sup>1</sup>

manner of appointment and removal. He may direct his subordinates, who exercise under him, in certain cases, the power of appointment and removal, with respect thereto, and may regulate the manner in which they may act for him; but this is an administrative order of the Executive, not made in compliance with any law, or in regulation of the execution of any law enacted by Congress restricting his right of removal, but is simply an instruction to those who hold positions by virtue of his appointment of the manner in which they shall discharge their duties in respect to the removal of their subordinates. The order is not the law of the land; it is not the emanation of the law-making power, but is merely a regulation adopted by the Executive, as he rightfully might, in regulation of the conduct of those who are subject to his authority. He made it, and may, at his pleasure, rescind it. The law of the land is not subject to repeal by the Executive. The regulation and orders of the Executive or heads of departments under authority granted by Congress—such as the order under consideration here—are regulations prescribed by law in the sense that acts done under them are upheld, and in that light they may have the force of law. But the failure to do the act thereby enjoined, or the doing of the act thereby prohibited, does not render one liable to the law. (United States v. Eaton, 144 U. S., 677, 688, 12 Sup. Ct., 764.) Consequently, no vested right to hold office indefinitely is acquired by the incumbent by virtue of the executive regulation in question. This executive order or regulation, therefore, confers no right upon the incumbent of office of which a court of equity can take cognizance. He who disobeys such order of the President is responsible to it, and must be dealt with by, him. Courts of equity are not constituted to regulate the departments of the government. Their jurisdiction is limited to the protection of the rights of property. They have no concern, as I understand the boundaries of their jurisdiction, over the appointment and removal of public officers.<sup>2</sup>

See also Taylor v. Kercheval (82 Fed. Rep., 497), in which case the court said: "It needs neither argument nor citation of authority to demonstrate that neither the President nor the Civil Service Commission is clothed with legislative powers. Neither can change the law, either by repeal or by making a new enactment. And it is equally elementary that Congress can not delegate its legislative powers either to the President or the Civil Service Commission. The rules promulgated which place office deputies in the marshal's office in the classified civil list are not a statute, nor have they the force of law. They are merely executive rules and regulations, promulgated by authority of law, and are effective, if at all, only as rules and regulations for the internal control and government of the civil service and the executive departments. The courts of chancery have no jurisdiction or authority to enforce such rules or regulations. Their enforcement lies within the domain of the executive departments, which possess ample power to enforce the proper observance of and subordination to the rules and regulations promulgated by the Executive for the government of those employed in any executive department of the government. If the marshal, by the removal or threatened removal of the complainant, has violated, or is about to violate, these rules and regulations, there is ample power in the Department of Justice to redress the wrong, without any resort to a court of chancery."

But see the case of Butler v. White (83 Fed. Rep., 578), in which the court held: "First, that the act known as the 'Civil Service Act,' is constitutional; second, that Congress has not delegated to the President and the Commission legislative powers; third, that by rule 3, sec. 1, the Internal Revenue Service has been placed under the Civil Service Act and rules made in pursuance of it; fourth, that the plaintiffs in these actions are officers of the Government in the Internal Revenue Service; fifth, that they cannot be removed from their positions except for causes other than political, in which even their removal must be made under the terms and provisions of the Civil Service Act and the rules promulgated under it, which, under the act of Congress, became a part of the law; sixth, that the attempt to change the position and rank of the officers in these cases is in violation of law; seventh, that a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the Civil Service Act."

<sup>1</sup> "It would require too much space to enumerate all the statutory provisions of this class down to the present time, in which 'regulations,' as such, are authorized to be

The power to make regulations is not, indeed, confined to political bodies or officers. It enters into other relations of life wherever, in fact, *government* is necessary.<sup>1</sup> (See *post*, p. 748, note.) Thus, corporations possess the power of making regulations, including by-laws. Social clubs have the power, and their regulations are recognized by the courts as binding.<sup>2</sup> We here speak of by-laws as regulations. In one sense a distinction has been made between them in the law of corporations, the by-law being held to be more usually established for the government of the internal affairs of the corporation, while the regulation is regarded as intended for the government of its business with the public.<sup>3</sup> But the word *regulation* is here used in a broader sense and as including the by-law.

In the case of *Yturvide v. The Metropolitan Club*, the court of appeals of the District of Columbia said:

"There is no longer any question of the right of a corporation, such as that of the respondent in this case, to make by-laws, even in the absence of express statutory power, and to exercise the power of amotion, as incident to the corporation. This has been regarded as the settled law since the case of *Lord Bruce*, 2 Strange, 819, and the subsequent exposition of the whole doctrine in the case of *Rex v. Richardson* (1 Burr., 517, 539), by Lord Mansfield, speaking for the Court of King's Bench in 1758. In this last mentioned case, after reviewing the former decisions and the previous doctrine upon the subject, and

prescribed. For the principal of those enacted prior to 1886, reference may be had to the first edition of this work, page 18-19, note 3. Repeated instances also occur in the statutes where, though the word 'regulations' is not employed, the same meaning is conveyed by some equivalent term or expression, as by the term 'directions,' 'instructions,' 'forms,' 'requirements,' 'restrictions,' 'conditions,' 'limitations,' 'by-laws.' Not unfrequently a thing is required by the statute to be done in such manner, etc., as a head of a department, etc., may prescribe." The 'Regulations for the Government of the Revenue-Cutter Service' of the United States, issued by the Secretary of the Treasury, April 4, 1894, and resting on no authority more express than, is found in the terms of sections 2758 and 2762, placing the corps, consisting of the officers and crews of thirty-six vessels under the general direction of the Secretary, is a striking illustration of the discretion exercised by heads of departments in making regulations as to matters of detail." Winthrop's *Military Law and Presidents*, p. 18.)

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those whom to act under such general provisions to fill up the details." (Ch. J. Marshall, in *Wayman v. Southard*, 10 Wh. 1, 43.)

"A regulation is merely a 'governing direction.' It implies authority on one side, subjection on the other. . . . It is distinguished from *contract*, which implies the right of all parties to stipulate for terms. . . . A regulation is an order by authority." (Hon. William Lawrence, 1 Dec. First Cong. 55.)

"Every public assembly has the power to make and enforce certain rules for the transaction of business and the preservation of order." (Jackson on Constitutional Conventions, p. 463.) Passenger-carriers may prescribe reasonable regulations for the control of passengers and employers for their employees.

<sup>1</sup>Thompson on Corporations, § 937.



showing that the older cases had maintained a doctrine that had been modified by the more recent cases, the Lord Chief Justice said: 'We all think this modern opinion is right. It is *necessary* to the good order and government of corporate bodies, that there should be such a power (that of amotion), as much as the power to make by-laws. Lord Coke says (*Bagg's Case*, 11 Co. 38a) 'there is a tacit condition annexed to the franchise which, if he breaks, he may be disfranchised.' But where the offence is merely against his duty as a corporator, he can only be tried for it by the corporation. Unless the power is *incident*, franchises or offices might be forfeited for offences, and yet there would be no means to carry the law into execution. Suppose a by-law made to give power of amotion for just cause, such a by-law would be good. If so, a corporation, by virtue of an incidental power, may raise to themselves authority to remove for just cause, though not expressly given by charter or prescription.' The doctrine of that celebrated case has never been questioned from the time it was announced, and it is the law, both in England and in this country, at the present day. (*Com. v. St. Patrick Ben. Soc.*, 2 Binn., 448, 449; 2 Kent. Com., 297.)"

As already stated with reference to army regulations made pursuant to statute, regulations of this kind may be modified, but exceptions to them in individual cases can not legally be made.<sup>1</sup> There is, however, a difference to be observed in this respect between general regulations and specific acts. Ordinarily when an executive officer is empowered by law to do one specific act, as, for example, to reserve public land for a specific public use, his doing this act exhausts his power as to the

<sup>1</sup> This is illustrated by the following new-paper comments (1897).

"The appointment of General Tyner to be Assistant Attorney General for the Post Office Department has been criticised by some as a violation of the civil service law, in that the place being under the Post Office Department was included within the classified service by an order of President Cleveland.

"Civil Service Commissioner Procter to-day stated that when President Cleveland ordered the classification of the Post Office Department, it was not supposed that the place of Assistant Attorney General for that Department was within the scope of that order. When it was found that such was the case, the matter was brought to the attention of President McKinley, who excepted the place, allowing the appointment to be made without examination by the Civil Service Commission.

"The announcement that the President had excepted this place after it had been included in the classified service, even if such classification was the result of a mistake, has created surprise, as the Commission has contended that when once a place was included in the classified service by order of the President, under authority of the civil service law, such action had the force of law and could not be rescinded except by act of Congress.

"At the office of the Civil Service Commission to-day it was stated that this view of the effect of an order including a place in the classified service was the accepted opinion of the Commission, but it was not generally understood that the President still retained the power to 'except' any place from examination, and to make the appointment without the intervention of the Commission, the place still being in the classified service, the only restriction placed upon such power being the provision that he could make 'necessary' exceptions."

subject-matter. So, where he is empowered to do a specific set of acts. But when he is given a general discretionary power to make regulations in execution of a law, the power to modify regulations once made is included in it.

A distinction should, however, be made between essential regulations made in aid of a statute, such as are necessary to the execution of the statute and thus have the appearance of being of a decidedly legislative character, and regulations which are merely supplemental to these and relate to the minor details of the machinery for the execution of the statute. These are, to be sure, made in aid of it also, but are not of the character referred to. It is, however, impossible to lay down any rule which would enable us, at a glance, to distinguish in every case the one from the other. There is not always a clear-cut line of demarcation. The distinction exists, but its application must be controlled by the facts of each case.

The Judge-Advocate General's Office has applied the principle of the binding character of regulations made in execution of statutes to regulations made for the disbursement of an appropriation, holding that when Congress makes an appropriation, but leaves it to the Executive to prescribe regulations for its disbursement, such regulations should be regarded as made in execution of a statute (although not actually pursuant to it), and therefore as falling under the rule that they are binding on the authority who made them as well as on others, and that they may be modified, but that individual exceptions to them can not be made. And the action of the War Department is understood to have been a confirmation of this view.<sup>1</sup> The regulations in question related to the expenditure for the transportation of deceased soldiers to the place of burial.<sup>2</sup> Another example of a regulation of this

<sup>1</sup> I have not, however, undertaken to discuss what effect the existence of a state of war might have on this principle. In point of fact, regulations are very freely waived in time of war, and that too without regard to the class to which they belong.

<sup>2</sup> The Judge-Advocate General's views were, on this occasion, stated as follows:

"Paragraph 102, Army Regulations, provides that the remains of deceased soldiers will be transported by the Quartermaster's Department to the nearest military post or national cemetery for burial, unless the commanding officer directs burial at the place of death proper. It also prescribes that the expense of transporting the remains is payable from the appropriation for army transportation.

"In the case presented in this communication transportation for the remains of a deceased soldier from Fort Walla Walla to Middletown, Pennsylvania, is asked for, and my opinion is desired as to whether the Secretary of War has authority to grant the request.

"The regulation cited is one for the disbursement of a public fund. The appropriation act does not prescribe regulations for this disbursement, but leaves it to the Executive to do so. This is the same, in effect, as if Congress had expressly authorized the Executive to make regulations. Therefore, regulations made by the Secretary of War, determining the amounts of the disbursements of the appropriation should, it is believed, be regarded as made in aid of a statute. Such parts of the regulation as relate to the purely administrative machinery for the expenditure of the appropriation may, however, in my opinion, be distinguished from the quasi legislative part prescribing the amounts of the disbursements. To the former I have

kind is that fixing the fees of civilian witnesses before courts-martial, for, although in deference to the views of the Comptroller of the Treasury these fees have been made to conform to those of witnesses before the Federal courts, as regulated by the Revised Statutes, this regulation is none the less an exercise of the executive power in carrying out an appropriation, and has no dependence on the statute with which it has been made to conform.\* And another example of such a

no doubt the Secretary of War can make exceptions, to the latter I am of opinion that he can not. Regulations of this kind should, for the purposes of such inquiry as is made in this case, be classed with those made pursuant to statute, as to which I am of opinion, that they should be held to have become a part of the law, and to be of the same force as the statute itself, and that, although they may be changed by the authority making them, they are binding on such authority so long as they are not changed, and that he can not grant exceptions to them. (See page 504, section 2, *ante*.)

"It is true that in cases like the present the regulation is not actually made pursuant to statute. The statute does not itself expressly provide for the making of the regulation, but leaves it to be done by the Executive in the exercise of the constitutional power vested in him as commander-in-chief and by the requirement that he shall 'take care that the laws be faithfully executed.' But the regulation is none the less in aid of the statute, in the relation which I have indicated—prescribing an essential rule for the disbursements to be made under the statute, and not merely relating to the administrative means of applying the rule.

"This seems to me to be the sound view to take of this matter. The action of the War Department has, however, not been consistent with reference to regulations of this class—possibly because the difference between them and purely administrative regulations, having no such intimate relation with statutes, has not been noticed. With reference to the regulations made pursuant to the act of Congress relating to the examination of enlisted men for promotion, it has been held that they can not be waived in individual cases, and, on the other hand, as I am informed, the regulation prescribing the per diem allowances of civilian employees when traveling under orders has been waived in individual cases. I understand that the right to make this waiver has been recognized by the Comptroller of the Treasury, although in a decision of the Assistant Comptroller with reference to the transportation of officer's baggage the latter seems to recognize the distinction which I have made, for he admits the right of the Secretary of War to make an exception to a regulation prescribing the method of transporting an officer's baggage, while apparently not admitting his right to make an exception increasing the money allowance for it in an individual case.)

"The practice of the War Department does not therefore appear to be uniform, but, in my opinion, its action in the matter of the regulations made in aid of the statute relating to the promotion of enlisted men is based on the correct view of this question, and, applying what was held in that matter, to the present case, I am of opinion that the exception to a regulation, asked for, would be contrary to the true conception of the force of such regulations and therefore unauthorized."

As to the President's power to make regulations prescribing allowances, see *United States v. Webster*, 28 Fed. Cases, 509; *United States v. Ripley*, 7 P., 18, 24 Ct. Cls., 209.

\*The following is an extract from a report of the Acting Judge-Advocate General, dated February 6, 1893, when this subject was under discussion:

"In the Army Appropriations Act an appropriation is each year made for the 'compensation of reporters and witnesses attending upon courts-martial and courts of inquiry.' No rate of compensation is prescribed, nor is it in terms indicated by whom the rate shall be fixed, but these appropriations have from year to year been made with the knowledge and in recognition of the fact that the law was being supplemented by regulations fixing the rates of compensation. This has been done for many years, and the propriety of such regulations has thus been distinctly recognized by Congress.

"To me it seems to be entirely clear that the appropriation was intended to be expended under rules prescribed by the head of the Department charged with the expenditure, and that the rate of compensation was a matter left to the discretion of the Secretary of War. The Second Comptroller does indeed refer to section 848 of

regulation was that by which the reward for the apprehension of deserters was regulated, before Congress was induced to take to itself the determination of the amount of the reward.

the Revised Statutes as though it might be held to fix the compensation of civilians attending as witnesses before courts-martial, but that section relates entirely to the Federal judiciary, of which courts-martial form no part, and is no more applicable to courts-martial than any other provision of the title ('Judiciary') in which it is found.

"The fixing of the rate of compensation has, it seems to me, been purposely left by Congress to the Secretary of War. It has been intrusted, to his discretion, and whenever, in the exercise of that discretion, he established a certain rate, that decision is legally conclusive on all. In my opinion the Second Comptroller, in announcing his intention not to allow payments made according to the rates established by the Secretary of War, is exceeding his authority.

"The disallowance of such payments will give much trouble, and yet I can not recommend the recognition of a right on the part of the Second Comptroller to set aside a regulation made by the Secretary of War in the exercise of a legal discretion."

The power of the President to determine the amount of fees and allowances for specified services, when an appropriation for them is made, but Congress does not itself determine the rates of such fees and allowances, is beyond all question, and has been recognized by the practice both of Congress and the Executive, as well as in the decisions of the courts. In *United States v. Webster*, 2 Ware, 46; 28 Fed. Cases, 5090, Judge Ware, of the United States district court of Maine, held, with reference to an army regulation making a certain allowance, as follows:

"Nor do I see how it can be overcome but by a direct denial of the authority of the Department to establish any such rule, with respect to extra allowances, by general regulations and orders. It appears to me, that it is fairly within the authority of the War Department, under the sanction of the President, to establish general rules upon this subject, which, when duly promulgated, will be binding on the rights of officers. It is not contended that an order of the Executive can control an act of the legislature, or deprive a party of a right acquired under the law. But, as has been remarked, the legislation of Congress can never go into all the minute detail of regulation, involved in the complicated service of the Army. Much must unavoidably be left to the discretion of the high officers, who superintend that branch of the public service; and as these matters of detail are left to the regulation of the Department, it seems to me reasonable, when officers are required to perform services which do not fall within the range of their ordinary duties, that it is properly within the discretion of the Department to determine what, and whether any, extra compensation should be allowed for such extra service, taking care that the rule be uniform, and applying in the same way to all similar cases. An authority of this kind seems to me to be clearly implied, in the reasoning of the court in the cases which have been before mentioned. 'The amount of compensation,' says Mr. Justice McLean, 'in the military service, may depend in some degree upon the regulations of the War Department, but such regulations must be uniform, and applicable to all officers under the same circumstances.' *United States v. Ripley*, 7 Pet. 32 U. S., 25. And in still broader terms he says, in the opinion before quoted, 'Hence, of necessity, usages have been established in every Department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within respective limits, and no change of those usages can have a retrospective effect, but must be limited to the future.' (*United States v. McDaniel*, *id.*, 15.) If usage is to govern, in what manner does usage become established? Obviously in no other way than by the practice of the Department. Apply the remark to the case now in judgment. A usage of allowing extra pay, for extra services of any particular kind, is established, by its being charged in various instances, and allowed and ordered to be paid, by the Department. It is obvious, therefore, that no usage can be established but by the concurrence of the Department, for no number of charges, however numerous, on the part of the officers, can ever constitute a usage, under which any right can be claimed, unless they have been allowed. It is the allowance which constitutes the usage." This case was carried to the circuit court by writ of error, but did not come from hearing until after the decision in the case of *United States v. Elison*, 16 Pet. 41 U. S., 291, made in 1842. It was then affirmed, without argument, upon the authority of that decision.



It is said that regulations made under a statute may be referred to as a practical interpretation of the statute.<sup>1</sup> In executing the laws it is often necessary for executive officers to interpret and construe them, and this may be done by means of regulations. Such regulations are valid and binding, unless declared by the courts to be erroneous interpretations of the law. Each new tariff act, for example, necessitates many such regulations, and we have a good illustration of this in the Treasury Circular of September 4, 1897, with reference to the entry of personal effects under the act of July 24, 1897. In this circular we find the following definition of the phrase, "residents of the United States returning from abroad," as it occurs in the act:

"The proviso in paragraph 697 contains special provisions and limitations concerning residents of the United States returning from abroad. It therefore becomes necessary to define the term 'residents of the United States returning from abroad,' in order that customs officers may have a reasonable guide in the practical application of the proviso. The word 'resident' has, in law, more than one meaning, much depending upon the connection and purpose in which it is used. As used in this proviso to paragraph 697, it is held by the Department to include all persons leaving the United States and making a journey abroad, and, during their absence, having no fixed place of abode. Persons who have been abroad two years or more, and who have had, during that time, a fixed place of abode for one year or more, will be considered as nonresidents within the meaning of this law."

So, Article 243 of the Naval Regulations of 1896 prescribes as follows: "The title 'commander-in-chief,' when occurring in naval laws, regulations, and other documents, shall be held to refer to the officer in chief command of a fleet or squadron." And the United States circuit court, district of Massachusetts (Colt, J.), recognized this regulation as conclusive, *in re* Jesse G. Grain, December 31, 1897.

And so it is in all the executive departments. In making regulations to carry out a statute it is often necessary to place some express interpretation on it; and this interpretation holds good until judicially reversed. But, of course, great care should be taken to avoid strained interpretations.

Many systems of regulations, besides army and navy regulations, have been issued, for the transaction of the business of different branches of the Government, such as the postal, patent office, pension office, land office, Indian office, civil service, customs, internal revenue, revenue-cutter service,<sup>2</sup> and other treasury and consular regulations,

<sup>1</sup> *United States v. Cottingham*, 1 Rob. (Va.), 635, Winthrop, 19, note.

<sup>2</sup> The regulations for the government of the Revenue-Cutter Service are in one respect unique: they establish a penal system, including a code of penalties and a system of procedure. No other regulations have ever undertaken to go to this extreme,

etc. But these systems of regulations, as they are here called, form by no means the whole of that mass of regulation law which constitutes so large and important a part of our administrative law. All regulations are not collected together in systems or groups, but an enormous mass of them consists of individual regulations,<sup>1</sup> the knowledge of whose existence even is ordinarily limited to the few who have to apply them to the subjects to which they relate.

It is difficult to form a true conception of the vastness and importance of all this great body of executive regulation law, controlling, as it does, the administration of all the executive departments with its rules of action. And when we consider that these rules of action are in general made, construed, and applied by the same authority, thus combining quasi-legislative, quasi-judicial, and executive action, we cannot fail to be very much impressed with the extent of the jurisdiction covered by them.

In what has been said only the regulation law of the Federal gov-

and it may well be doubted whether the executive power can be legally carried so far.

The regulations of the United States Military Academy do, indeed, also prescribe a system of punishments, certain of which may be imposed by the Superintendent, without the intervention of any trial court, but these are regulations for the control of a school, and stand in this respect on a different footing from the regulations for the government of the Revenue-Cutter Service. Moreover they are substantially based on statute, except, more particularly, in those respects in which the authority for the regulations adopted is the power to prescribe the necessary rules for a public institution peopled with persons whom it is necessary to govern and control. They are issued by authority of the President, but, had none been so issued, the Superintendent himself would have had the power to make such reasonable regulations for the government and maintenance of the discipline of the institution as would not be inconsistent with statute or regulations emanating from a higher source, and he now actually has the power as to matters necessary to regulate but which have not been covered by prescribed regulations.

The Superintendent of the Naval Academy has a very comprehensive authority in this respect, which is expressly delegated to him by the Secretary of the Navy. "In the exercise of this authority he issues a complete system of 'Regulations for the Interior Discipline and Government of the U. S. Naval Academy' covering subjects which, at the Military Academy, are governed by regulations 'adopted by the President.'" Both of these Superintendents, in addition to being in control of schools, are commanding officers of posts, with the authority appertaining to them in that capacity. See note, page 748, *post*.

The regulations for the government of the Revenue-Cutter Service are issued in the exercise of the general executive power of the President, whereas his power to make army regulations is based on legislation he derives from his constitutional authority as commander-in-chief. How far this power would extend were Congress not vested with a superior power over the subject, or if, being so vested, it should entirely fail to exercise the power and to provide any system of government for the Army, it would be difficult to estimate. Would he have a power already exercised, with apparently less authorization, in the promulgation of regulations for the government of the Revenue-Cutter Service?

<sup>1</sup>See opinion of Attorney-General, May 22, 1900, addressed to the Secretary of the Navy, in the matter of the relative rank of Majors L. and M., of the Marine Corps. It is said in this case to say: "Where the matter is not regulated by statute, you may yourself determine them, with the force and effect of law, by virtue of your general authority under the President to make rules and regulations for the government of the Navy. Usually, of course, this is better done by general rules than by decisions in particular cases, but it may be done in either way."

ernment has been considered. When we examine the State systems we find there also a great deal of regulation law—not in such large masses, nor in general of such importance as the federal regulation law, but nevertheless occupying no insignificant place in the State systems.<sup>1</sup> The whole subject is one of exceptional interest, and offers an enormous field for investigation.

The Supreme Court has repeatedly recognized the legality and force of army regulations:

"The Army Regulations, when sanctioned by the President, have the force of law, because it is done by him by the authority of law. The regulations of 1825, then, were as conclusive upon the accounting officer of the Treasury, whilst they continued in force, as those of 1836 afterwards were, and as those of 1841 now are. When, then, an officer presents with his account, an authentic document or certificate of his having commanded a post or arsenal, for which an order has been issued from the War Department, in conformity with the provisions of the Army Regulations, allowing double rations, his right to them is established, nor can they be withheld without doing him a wrong, for which the law gives him a remedy." (*United States v. Freeman*, 3 How., 567.)

"As to the Army Regulations, this court has too repeatedly said that they have the force of law to make it proper to discuss that point anew." (*Gratiot v. United States*, 4 How., 118.)

"The power of the Executive to establish rules and regulations for the government of the Army is undoubted." (*United States v. Eliason*, 16 Pet., 301.)

"The Army Regulations derive their force from the power of the President as commander-in-chief, and are binding upon all within the sphere of his legal and constitutional authority." (*Kurtz v. Moffitt*, 115 U. S., 503.) See also *Swain v. United States*, 165 U. S., 553.<sup>2</sup>

<sup>1</sup>In many of the States the governors have express statutory authority to make regulations for the government of the militia, as, for example, in New Hampshire, where "The commander in chief is authorized to establish and prescribe such rules, regulations, forms, and precedents as he may deem proper, for the use, government, and instruction of the New Hampshire National Guard," and "to make such changes and alterations in such rules and regulations from time to time as he may deem expedient; but such rules and regulations shall conform to this act, and to those governing the United States Army, and shall have the same force and effect as the provisions of this act."

In Michigan a "State military board" is created, with power "to prepare and promulgate all articles, rules, and regulations for the government of the State troops not inconsistent with the laws of the United States or of this State, and which articles, rules, and regulations, when approved by the commander in chief, shall be in force."

Some of the States have no military regulations of their own, but use the United States Army Regulations, so far as applicable.

<sup>2</sup>See also *United States v. Landers*, 92 U. S., 77; *ex parte Reed*, 100 U. S., 13; *United States v. Symonds*, 120 U. S., 46; and Am. and Eng. Enc. of Law, "Military Law—Army Regulations," *Dugan v. U. S.*, 34 Ct. Cl., 458, Opus Atty. Gen., Feb., 1900, in *Lt. Brown's case*, (G. O. 21, A. G. O., 1900; *In re Fair*, 100 Fed. Rep., 149.

With reference to navy regulations, issued under section 1547 of the Revised Statutes, Attorney General Devens said that what Congress had conferred on the Secretary of the Navy was not any portion of its general power of legislation, but only the right to make appropriate regulations for the performance of their duties by those whom Congress had placed under his official control. But if it is true that the source from which the President derives his authority to make regulations is statutory, in the absence of statute he would have no authority, and this we know not to be so. There is no similar existing provision of law relating to the Army, but the power of the President to make regulations for the Army is unquestioned.

### CHAPTER III.

#### APPROVAL OF REGULATIONS BY CONGRESS.

An impression has existed that a peculiar "force of law" is given to regulations by their approval by Congress, but it seems to be an erroneous one. If, as above stated, the making of regulations is within the jurisdiction both of Congress and the President, but the authority of Congress is superior to that of the President, it follows that when regulations are approved by Congress they can not be altered by him until the approval is removed. To this extent regulations approved by Congress may be said to have a superior force of law to those not thus approved, but this is not the erroneous impression referred to. Precisely what it is, is not clear, but it seems to have been believed that the approval of regulations by Congress makes them of higher obligation. This, however, is not true. Whether approved by Congress or not, they have, so long and so far as they are in force, the force of law,<sup>1</sup> and are therefore binding. The distinction, in this respect, that has sometimes been made between regulations approved by Congress and those not thus approved is misleading.

Congress has on several occasions given its sanction to army regulations:

1. An act of March 3, 1813 (2 Stat. L., 819), provided, "That it shall be the duty of the Secretary of the War Department, and he is hereby authorized, to prepare general regulations, better defining and prescribing the respective duties and powers of the several officers in

<sup>1</sup> *Gratiot v. United States*, 4 How., 119; *United States v. Barrows*, 24 Fed. Cases, 1018; *United States v. Wahl*, 75 Fed. Rep., 261; *McCall's Case*, 2 Phila., 269, and other authorities cited *ante*, and in Winthrop's Military Law, vol. 1, p. 20, note 2.



the adjutant general, inspector general, quartermaster general, and commissary of ordnance departments, of the topographical engineers, of the aids of generals, and generally of the general and regimental staff; which regulations, when approved by the President of the United States, shall be respected and obeyed, until altered or revoked by the same authority. And the said general regulations, thus prepared and approved, shall be laid before Congress at their next session."

A system of regulations was laid before Congress, as required by the act. It was published (together with the statutes relating to the military establishment) in book form, from the Adjutant and Inspector General's Office, May 1, 1813, and may also be found in Vol. I of the American State Papers on Military Affairs.

2. By act of April 24, 1816 (3 Stat. L., 298), it was prescribed "that the regulations in force before the reduction of the Army be recognized, as far as the same shall be found applicable to the service, subject, however, to such alterations as the Secretary of War may adopt, with the approbation of the President." The reduction referred to was made in June, 1815, pursuant to an act of March 3.

The act of April 24, 1816, did not relate to any particular code of army regulations, but to all the regulations which were in force.

3. As stated in some brief remarks on the different editions of army regulations, made on a former occasion:

On the 22d December, 1819, the House of Representatives resolved that "the Secretary of War be instructed to cause to be prepared and laid before this House, at the next session of Congress, a system of martial law, and a system of field service and police, for the government of the Army of the United States."

On the 22d of December, 1820, the Secretary of War (Calhoun) accordingly submitted a system of "martial law," prepared by Judge-Advocate Major Storrow (which was never adopted), and a system of field service and police, which had been prepared by General Scott, and submitted to the War Department in September, 1818.<sup>1</sup>

<sup>1</sup>General Scott, in submitting his code, said

"I have the honor to inclose, herewith, the analysis of a work long since projected by me. The accomplishment of some similar design seems an important desideratum in our code of military instruction or legislation. But, on this point, the analysis, compared with existing regulations, will best speak for itself. I can only say that the formation of it has cost me much study and reflection, aided by the experience of a ten years' service, in peace and in war, in the line and in the staff, in the infantry and in the artillery.

"When in Europe I collected every work, in French or in English (not obsolete), on the service, police, discipline, instruction, and administration of an army. These have been carefully read and collated, and, under the sanction of the War Department, I am now ready to compile a book, to correspond with the several articles of the accompanying analysis, taking, as a basis, our own laws, regulations, orders, and practice, as far as the paucity of the material may suffice.

"Should the idea of a book occur, in connection with this offer, I would beg leave

December 26, 1820, the Speaker laid them before the House. The document was in manuscript and was ordered to be printed, and a copy laid upon the desk of each member. (It is reprinted in the third volume of the State Papers on Military Affairs.) When the book was printed several copies were sent to General Scott, who made certain corrections, and on the 20th February, 1821, returned a corrected copy (of which he retained a duplicate) to the War Department for the committee of the House. It was received by the chairman of the committee on the 23d of February, 1821.

February 27, 1821, the chairman of the Military Committee of the House reported the Senate bill, "to reduce and fix the military peace establishment," with certain amendments, among which was the addition of a section approving and adopting "the system of General Regulations for the Army, compiled by Major-General Scott." The bill, including this (the fourteenth) section, became law March 2, 1821. Early in that month, General Scott received directions to put the book to press for the use of the Army, and, having received a letter from the chairman of the Military Committee of the House, informing him that the corrected copy had been received and section 14 added to the Army bill by way of amendment, he caused the book to be reprinted from his retained duplicate corrected copy.

The regulations were then—July, 1821—issued by the War Department, *with the corrections*, as "formally approved by Congress," except as to fourteen articles, which, it was stated in an order of Secretary of War Calhoun, prefacing the work, had received the sanction of the President.

This gave rise to the question, Was the corrected copy the one approved by Congress? In 1822, a committee of the House of Representatives was appointed to investigate the circumstances attending

to suggest, that, joint labors, of the literary kind, but rarely succeed, and that I have, personally, a repugnance to that sort of employment, which nothing but a positive order could induce me again to forego. Indeed, I am persuaded (and from a personal experience somewhat in point) that, of five individuals, of equal qualifications, either might make a better book than the five taken together."

"Perhaps it might be well to give the titles, etc., of the works from which I should expect to compile, but, as this might also seem ostentatious, without a more apparent necessity, I will, at present, confine myself to the mention of the two following, which are the principal."

"1. 'Législation Militaire, ou recueil méthodique et raisonné des lois, décrets, arrêtés, réglemens et instructions actuellement (1812) en vigueur, sur toutes les branches de l'état militaire,' par Berrut, etc., 8vo large 8vo volumes, pp. 2509. Notwithstanding the title and the bulk of this manual of the French army, it does not contain, except by reference, a syllable of the *tactique* of the several corps."

"2. 'General Regulations and Orders for the Army'—edition of 1813 pp. 326, in two. The British manual, like that above, merely refers to the regulations on tactics. In the execution of the work now proposed, similar references would, occasionally, be necessary."

its publication. Gen. Alexander Smyth, the chairman of the Military Committee, stated that when he proposed section 14, of the act of 1821, to the committee as an amendment, he had reference to the corrected Regulations which he had then received, and that he did not recollect exhibiting them to the committee, but thought he had, and believed that when he reported the amendments to the House, he had the corrected copy and deposited it with the clerk with the intent that from that copy the system should be published. These recollections were not, however, sustained by the other members of the committee nor by the clerk of the House. None of them apparently had ever seen the corrected copy *before* the passage of the law, but the clerk of the House thought he had seen it *subsequently*, when General Smyth made a return to him of various papers which had been before the committee, and he refused to receive it, not considering himself the proper repository. Search had been made in his office, but it could not be found.

The select committee reported that it was an act of omission, and not of design, on the part of the chairman of the Military Committee in not submitting the corrected copy to the committee.

The committee reported, May 6, 1822,<sup>1</sup> and Congress immediately passed an act—which was approved May 7—repealing the fourteenth section of the act of 1821.

General Guines was accused by General Scott with being instrumental in raising the opposition to these regulations.

4. By an act of Congress of July 28, 1866, the Secretary of War was directed to have prepared, and to report to Congress, at its next session, a code of regulations for the government of the Army and of the militia in actual service, including rules for the government of courts-martial, the existing regulations (those of 1863) to remain in force until Congress should have acted on such report—not, as it has been erroneously stated, until Congress should otherwise provide.

It was said by the Court of Claims (13 Ct. Cls., 6), and repeated by Attorney General Brewster, that under the act of 1866 a report of a code of regulations for the government of the Army was made but not acted on. This was evidently a mistake: a system of regulations was prepared by a board consisting of Generals Sherman, Sheridan, and Augur, but it does not appear to have been submitted to Congress. A revision of the Articles of War was reported, but not, it would seem, a code of regulations.

<sup>1</sup> For the report of this committee (containing General Scott's explanation), see *American State Papers*, Vol. XIII, p. 422. See also Winthrop's *Military Law and Precedents*, p. 23.

The act of 1866 was construed by the Court of Claims, the Attorney General, the Second Comptroller, and Secretary of War Belknap<sup>1</sup> to have had the effect of an adoption by Congress of the regulations of 1863, but there has been little agreement as to how long the regulations so adopted remained in force. The legislation has sometimes been regarded as repealed by the repeal provisions (section 5596) of the Revised Statutes, if not already superseded by the act of July 15, 1870, which again provided for the preparation of a system of regulations, to be reported to Congress "at its next session." It has also been held that the regulations of 1863 remained in force, by virtue of the legislation of 1866, until superseded by the regulations of 1881, issued under the act of July 23, 1879, authorizing the Secretary of War to cause all the regulations of the Army and general orders then in force to be codified and published.<sup>2</sup> And they have been treated as in force subsequently to this. According to Second Comptroller Maynard, in 1886 (Dig. Opin. Second Comptroller, vol. 3, § 867), and the Court of Claims, in 1888 (23 Ct. Cls., 461), they were in force at those dates, by virtue of the legislation of 1866.

Two codes of regulations have been issued since then, but not under any act of Congress.<sup>3</sup> If, therefore, the regulations of 1863 were in fact in force, by legislative adoption, at the time of the issue of the last two codes (1889 and 1895), as they were if the Second Comptroller and the Court of Claims were correct, they were not legally alterable by the later codes, and are not legally alterable by executive action now, and all the actual alterations of rules that have been thus in fact made are invalid, and the regulations of 1863 are still legally in force. But they were not.

The legislation of 1866 was undoubtedly repealed by section 5596 of the Revised Statutes, if it was in force up to the date of their enactment. That it was repealed by the legislation of 1870 does not appear to be true, because the provisions of the latter never took effect. But

<sup>1</sup> In submitting to Congress, February 17, 1873, a system of regulations prepared in accordance with the provisions of an act of July 15, 1870, Secretary Belknap said: "The regulations then and now in force are those of 1863. They are ten years old, and no longer adapted to the condition of Army affairs, but under the act of 1866, it is impossible for the Executive to change them. The length of a letter on a knapsack, for example, being presented therein, the Executive has no power to alter its size until Congress shall authorize it, and the regulations now presented will be subject to precisely the same objection, and if they are to be made law, not to be altered or amended save by act of Congress, there are many provisions that it would be wise not to present, as experience may show that alterations may be necessary. The Secretary of War, therefore, earnestly recommends to Congress that, if formally approved by that body, they be made subject to such alterations as the President may from time to time adopt."

<sup>2</sup> Attorney General Brewster, 17 Opin., 463.

<sup>3</sup> The legislation of 1875, hereafter described, considered by the light of its history, is believed to have been carried out, and satisfied by the promulgation of the regulations of 1881.



it would seem to have expired by virtue of its own terms at the end of the second session of the Thirty-ninth Congress, when the report called for not having been made, and it being no longer possible to make it at that session, as required, the legislation became inoperative. The regulations of 1863 existed from that time on (and, if not, certainly after the enactment of the Revised Statutes) as an ordinary executive code, not stamped with legislative adoption, but liable to be superseded, and in fact superseded, by the first code issued thereafter.

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## CHAPTER IV.

### THE DIFFERENT EDITIONS OF ARMY REGULATIONS.

The following information with reference to the different editions of Army Regulations, although but a brief sketch of the history of their adoption, will, it is believed, present the matter in a form convenient for future use.

Prior to the adoption of the Constitution, Congress (which then constituted the Government) provided, from time to time, for regulations for the Army, principally for the government of the staff corps. In some cases the Board of War, then consisting of civilians, was directed to make regulations. (2 Journals of Congress, 432, 520; 3 *id.*, 328.) In others, chiefs of the different corps were so authorized; as the Quartermaster General, for certain classes of his employees (*id.*, 126; 3 *id.*, 253, 496); the Inspector General (3 *id.*, 203, 523, 525); the Director of Military Hospitals (*id.*, 527); and the Medical Board (*id.*, 705). The Secretary of War, after one was appointed by Congress, was, in addition to his general duties, required to "regulate," or "direct," as to certain special subjects—as the making of payments and returns and keeping of accounts by regimental paymasters (4 Journals, 7), the making and transmitting of returns by officers generally (*id.*, 9), and the duties of the commissary general of prisoners (*id.*).<sup>1</sup>

In 1779 (March 29) the Continental Congress adopted certain "Regulations," to "be observed by all the troops of the United States." These had been prepared by Baron Steuben, and were published in the same year as "Regulations for the order and discipline of the troops of the United States." They were, for the greater part, a sys-

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<sup>1</sup>Winthrop's Military Law, p. 21, note 3. And see, generally, the subject of "Regulations for the Army," as discussed by this author.

tem of tactics and rules for the camp and on the march, but contained "instructions" for the different regimental officers and enlisted men. Another edition of these "regulations" was published in 1800, by M. Carey, of Philadelphia.

On the increase of the Army in 1798, in contemplation of war with a foreign power, President Adams issued manuscript regulations, supplemental to Baron Steuben's, containing many rules prescribing duties of the different grades of officers and enlisted men in service, and particularly as to the administration in a garrisoned post or barracks.

In 1808 a little volume containing the Articles of War and certain regulations with reference to allowances and promotion was published in Washington—apparently by authority—by "Dinsmore and Cooper."

Many of the regulations in force at the beginning of the year 1810, and which had been issued at different times since 1797, in the form of general and executive orders, are given in Duane's Military Dictionary.<sup>1</sup>

In 1812 the statutes relating to the military establishment and the existing regulations relating to allowances, promotion, and the duties of the staff were collected together and published in book form. These regulations are also to be found in the appendix to Maltby on Courts-Martial.

The regulations of 1813 have already been mentioned. They may be regarded as the first of our series of codes of army regulations.

<sup>1</sup>In this work (published in Philadelphia in 1810) it was said:

"There is no coherent or consistent system of regulations in existence for the military establishment of the United States. The economy of military arrangement is as essential as the discipline of the field, to assure the effects of military operations. There should be a well digested system of regulations, and upon that system should be engrafted a staff, susceptible of adaptation to the peace or the war establishment, to the smallest or the largest force. The French have derived the greatest advantage from their regulations, which have been formed by a well digested body of principles adapted to all circumstances, and the enforcement and execution of which is always distinctly appropriated to the proper officers of the staff. At present the regulations of the United States Army is [are] confined to a few general orders from the War Department, on detached points of service, and of occasional orders of the commander-in-chief, issued upon some exigency, at remote periods, and adopted into permanent use. In many instances these regulations have been altered by the War Office, in others the circumstances which gave rise to them have ceased, and the regulation become obsolete or inappropriate. In 1810, an attempt was made, by the establishment of a Quartermaster General's Office, to commence something like a system, should this be accomplished it may be beneficial, though the want of information in the duties of a staff, particularly if those heretofore arranged under the Quartermaster General's Department alone are to be adopted, that it is to be feared the system may remain defective, should the old English model, now exploded by the British themselves, be kept in view instead of the more enlarged system introduced in modern wars. The treatise on the staff by Girardin, contains the best body of regulations extant. It has been translated and will form a part of the American Military Library.

"The following are among the principal regulations in force at the beginning of the year 1810."

[Then follow the regulations referred to.]

the preceding publications, of 1808 and 1812, making no pretense to the establishment of a complete system, but merely republishing a few existing regulations. The greater part of this publication is, however, also taken up with a republication of statutes. The part of it devoted to regulations would not equal 20 pages of our present regulations.

Editions of army regulations were also issued in 1814, 1816, 1817, and 1820. Those of 1817 and 1820 were republications of the edition of 1816, with the addition of regulations issued by the War Department subsequently. These regulations may be found in the Library of Congress. Another addition was published in 1815, by Webster & Skinners, of Albany, New York, but this was not an authorized edition.

An edition was also issued in 1821, under the circumstances already described.

The next edition was that of 1825. It was a revision by General Scott of his regulations of 1821.<sup>1</sup>

In 1834 a system of general regulations for the Army was published by Francis P. Blair, of Washington. A copy of it is in the War Department Library. It was not an authorized edition, but seems substantially to coincide with that which was published in 1835 by authority and is known as the Macomb Regulations, having been revised by General Macomb. Some amendments to these were made in an order from the War Department, dated December 31, 1836, in which it was declared that the general order prefixed to the regulations of 1835 had never been promulgated, nor been in force, and directing the page containing it to be canceled, and the order of December 31, 1836, to be inserted in its place.

Another edition of army regulations was issued in 1841, and a revision by Gen. E. D. Townsend in 1847.

The next edition was that of 1857, when Jefferson Davis was Secretary of War, and sometimes, on this account, called the "Jeff. Davis Regulations." Tradition seems to connect Gen. Don Carlos Buell with the preparation of these regulations, but there is no record of it.

<sup>1</sup>A number of important regulations were published 1833, in Order, No. 48, of that year—"The 48th Commandant," as it seems to have been called. (Military and Naval Magazine, September, 1834.) In an article copied into this magazine from the "American Quarterly Review," in 1833, it was said: "Under the presidency of Mr. Monroe, and the secretaryship of Mr. Calhoun, a new era was formed in our national defence, the beneficial influences of which will continue to be felt as long as we are a free nation. Our present system of accountability and responsibility was then established. \* \* \* From that period the War Department has held a new rank in the Cabinet, and assumed a corresponding elevation in popular opinion. Previously, it had been regarded merely as the headquarters of the Army."

The regulations of 1847 contained the following article:

"ARTICLE X.

"THE COMMANDER OF THE ARMY.

"48. The military establishment is placed under the orders of the Major-General Commanding in Chief, in all that regards its discipline and military control. Its fiscal arrangements properly belong to the administrative departments of the staff, and to the Treasury Department under the direction of the Secretary of War.

"49. The General will watch over the economy of the service, in all that relates to the expenditure of money, supply of arms, ordnance, and ordnance-stores, clothing, equipments, camp-equipage, medical and hospital stores, barracks, quarters, transportation, fortifications, Military Academy, pay and subsistence—in short, everything which enters into the expenses of the military establishment, whether personal or national. He will also see that the estimates for the military service are based upon proper data, and made for the objects contemplated by law, and necessary to the due support and useful employment of the Army. In carrying into effect these important duties, he will call to his counsel and assistance the staff, and those officers proper in his opinion to be employed in verifying and inspecting all the objects which may require attention. The rules and regulations established for the government of the Army, and the laws relating to the military establishment, are the guides to the Commanding General in the performance of his duties."

This article (and General Scott laid stress on the fact that it was drawn up with care under the eye of Secretary Murey, and approved by President Polk during his absence in Mexico) was omitted from the Regulations of 1857, and a bitter attack on the Secretary of War by General Scott followed. An account of the controversy which thus arose, as well as of the circumstances that led up to it, is given in a paper by Mr. W. A. DeCaindry, on "The establishment of the War Department as one of the Executive Departments of the United States Government, with a general view of its interior organization and administration," published in 1878, as an appendix to the report of the Joint Committee of Congress on the regulations of the Army. General Fry, in his work on brevets, gives a copy of General Scott's objections to the regulations of 1857, and of Secretary Floyd's reply, in which latter occurs the following passage:

"The failure to insert in the new regulations a definition of the duties and authority pertaining to the office of commander-in-chief of the Army, which was contained in the old regulations, I am satisfied, does not, in any degree, take from it any power, authority, honor or command conferred upon that high office by law. Definitions are always difficult, sometimes impossible. The definitions in the old



regulations, attempting to define the duties of the principal officers of the Army, are not, in my judgment, satisfactory; and I think the new regulations wisely follow the example set by those which you prepared in 1825, in which no definitions were attempted."

The regulations in question were never restored.

The regulations of 1861 were a repetition of those of 1857, with, however, some modifications. There is a remarkable lack of information in the War Department in regard to the preparation of this code.

The regulations of 1863 were prepared by General Breck, and were issued under the authority of Secretary of War Stanton. They contain the previous army regulations of 1861, except an entirely new regulation for the Subsistence Department, which was approved separately; and they omit those for the Engineer Department, and are supplemented by an appendix containing "changes and additions to the Army Regulations up to June 25, 1863." As this was not a complete revision of the regulations, Mr. Stanton preferred to leave the original order (of the regulations of 1861) for its observance in the new edition, and to publish it as the regulations of 1861, with the additions above described.

The legislation of 1866, as affecting the regulations of 1863, has already been discussed. This legislation required the Secretary of War to have prepared and to report to Congress at its next session a code of regulations for the government of the Army. The draft of a code was prepared by General Townsend, and was submitted to a board convened in December, 1867, consisting of Generals Sherman, Sheridan, and Augur. In February, 1868, the board reported the completion of their duties, and submitted the regulations, revised by them, and approved by General Grant. June 12, 1868, General Schofield, Secretary of War, made a communication to Congress, in which he said:

"A very carefully prepared system of regulations for the Army and militia is now in my hands awaiting the action which may be taken on the Rules and Articles of War, with a view to making any alterations in them which may be required if the said rules and articles should be changed.

"In my judgment, however, it would be unwise to subject a code of general regulations for the Army to the formal action of Congress, thus giving them a fixed character, unalterable except by the same formal action. All matter in the regulations which should properly be bound by force of law is actually made in exact conformity with military acts of Congress, and is always, when practicable, in the precise language of the laws. But there are very many matters of detail which depend upon the daily changing necessities of the service, and

are regulated by the experience<sup>\*</sup> and intelligence of practical men in the Army, which should be left for modification, as often as circumstances demand, to the discretion of the Secretary of War and the President. It is a principle, well understood and invariably acted upon, that whenever a regulation becomes in conflict with a law of Congress, it is null and void. The law is thus, as it were, a constitution, and regulations are simply the by-laws based thereon.

"The authority to make alterations in the regulations was vested by act of April 24, 1816, in the Secretary of War, with the approval of the President, and has been ever since so exercised with this exception, that by an act of March 2, 1821, a system prepared by General Scott, under an act of March 3, 1813, 'was approved and adopted.' But this act of March 2, 1821, was repealed, in terms, by an act of May 7, 1822, leaving the act of April 24, 1816, still in operation. The Army Regulations are always public and easy of reference, and Congress can readily at any time correct, by legislation, an objectionable feature which may appear in them.

"I recommend that so much of section 37, act of July 28, 1866, as requires this code of regulations to be reported to Congress, be repealed. Its several parts have been prepared by officers of the largest experience and greatest familiarity with the operations of their particular branches of the Army, and the whole system has been very carefully examined, arranged, and harmonized by a board of the first officers in the Army. It has received the approval of General Grant, who has been consulted on all important points."

No further action was taken with reference to the system of regulations prepared by the Sherman Board. In submitting it to the Secretary of War, the board remarked:

"It has been our earnest endeavor to make this system as simple, plain, and consistent in all its parts as possible, and to make no changes from established usages, except where we were convinced by actual experience that they were necessary to the service. The regulations for the staff departments are all based substantially on the recommendations of the present heads of departments, save and except that we place all the heads of departments in the same relation to the General of the Army as the law already places him, the General, in relation to the President, the constitutional commander-in-chief. We have also endeavored more clearly to define the relative duties of the Secretary of War and the General-in-Chief. Their relative spheres of duty are so important, and harmony of action on their part is so directly reflected by the Army itself, that we think too much importance can not be given to this branch of the subject."

The following were the regulations with reference to the duties of the General-in-Chief proposed by this board:

"1. The military establishment is under the orders of the General of the Army in all that regards its discipline and military control. Its fiscal arrangements properly belong to the administrative departments of the staff, and to the Treasury Department, under the direction of the Secretary of War.

"2. The headquarters of the General of the Army shall be at the city of Washington, and all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and, in case of his inability, through the next in rank. The General of the Army shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate; and any orders or instructions relating to military operations issued contrary to these requirements shall be null and void; and any officer who shall issue orders or instructions contrary to the provisions of this law shall be deemed guilty of a misdemeanor in office; and any officer of the Army who shall transmit, convey, or obey any orders or instructions so issued contrary to the provisions of this section, knowing that such orders were so issued, shall be liable to imprisonment for not less than two nor more than twenty years, upon conviction thereof in any court of competent jurisdiction.

"3. The General will watch over the economy of the service, in all that relates to the expenditure of money, supply of arms, ordnance, and ordnance-stores, clothing, equipments, camp equipage, medical and hospital stores, barracks, quarters, transportation, fortifications, Military Academy, pay and subsistence—in short, everything which enters into the expenses of the military establishment. He will see that the estimates for the military service are based upon proper data, and made for the objects contemplated by law, and necessary to the due support and useful employment of the Army. He will call to his counsel and assistance the staff, and those officers proper in his opinion to be employed in verifying and inspecting all the objects which may require attention. The rules and regulations established for the government of the Army, and the laws relating to the military establishment, are the guides to the General in the performance of his duties."

The regulation numbered 2 was copied from a provision of the Army Appropriation Act of March 2, 1867, which, as the President declared in a message to Congress, deprived him of his constitutional functions as commander-in-chief, but which he was compelled to countenance,

as by withholding his signature he would defeat necessary appropriations. The legislation, enacted for a clearly unconstitutional purpose, was repealed in the Army Appropriation Act of July 15, 1870, when the political conditions were changed. It was not, indeed, quietly submitted to by the President, who on the 3d of September, 1867, issued his proclamation in which officers of the Army and Navy were reminded that in accepting their commissions they incurred the obligation to observe, obey, and follow such directions as they might from time to time receive from the President, or the General, or other superior officers set over them, according to the rules and discipline of war, and were enjoined, in this direct manner, to assist and sustain the courts and other civil authorities of the United States in the administration of the laws.

By an act of July 15, 1870 (16 Stat., 319), Congress prescribed:

"That the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the Army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session; *Provided*, That said regulations shall not be inconsistent with the laws of the United States."

Pursuant to this legislation, the Marey Board was convened July 3, 1871. The members of this board were Col. R. B. Marey, J. H. King, and H. J. Hunt, and Majors R. I. Dodge and A. J. Alexander. During November and December, 1871, and January, 1872, the report of the board was critically considered by the Secretary of War, by whom Asst. Adjt. Gen. Thomas M. Vincent, as the representative of the Secretary, had been associated with the board for the purpose of a further consideration of the proposed system. The system of regulations thus finally prepared by this board was submitted to Congress by Secretary of War Belknap, February 17th, 1873, and was published as H. R. Report No. 85, Forty-second Congress, third session. On the 13th of May, 1874, the Military Committee of the House made a report on the subject, concluding with a recommendation of the legislation subsequently (March 1, 1875) enacted. It provided:

"That so much of section twenty of the act approved July fifteenth, eighteen hundred and seventy, entitled 'An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and seventy-one, and for other purposes,' as requires the system of general regulations for the Army therein authorized to be reported to Congress at its next session, and approved by that body, be, and the same is hereby, repealed; and the President is hereby authorized, under said section, to make and publish regulations for the government of the Army in accordance with existing laws."



In 1876, a compilation was prepared by Capt. R. N. Scott, and printed under the following authentication:

“WAR DEPARTMENT, *July 1, 1876.*

“These regulations are a compilation of all rules for the government of the Army, which were in force January 1, 1876, and are based upon the Army Regulations of 1863, as altered or amended by orders, circulars, decisions, and laws passed since the latter year. Compiled, under the direction of the Secretary of War, by Capt. R. N. Scott, U. S. Army.

“H. T. CROSBY, *Chief Clerk.*”

This compilation was printed, but was not published to the Army, and, notwithstanding the foregoing indorsement, was not an authorized code. The records of the War Department seem to furnish no further information with regard to the circumstances of its preparation, but it may have been the final arrangement of a compilation made by Mr. John Tweedale, which consisted of the regulations of 1863, brought to date, agreeably to subsequent orders and amendments.

Just a month before this General Sherman had called attention to the necessity of a revision of the Army Regulations, and had recommended that the work of preparing a new code be assigned to General Schofield. Fortunately, he said, the task would be rendered comparatively light by the fact that two systems of regulations had already been prepared and were in print; one compiled in 1868-69 by a board consisting of Generals Sherman, Sheridan, and Augur, and the other compiled by the “Marcy Board” in 1873. It would, he thought, be preferable to have a single officer assigned to this work, rather than a board, because a board would be apt to begin *de novo* and go again over the very ground already well studied by previous boards.

General Schofield entered upon this work, agreeably to General Sherman's recommendations, but no system of regulations prepared by him was published. The first five articles of such a system were, however, printed, and referred to heads of staff departments for remark. One of the articles was as follows:

“The chiefs of the several staff corps, departments, and bureaus of the Army sustain the twofold relation of chiefs of bureaus of the War Department and chiefs of staff to the General of the Army. They act under the immediate direction and control of the Secretary of War, in respect to all matters of accountability and administration not immediately connected with military operations; they report directly to and act under the immediate orders of the General in Chief in all matters appertaining to the command of the Army; they are the repositories of the laws and regulations for the government of the military service

and of the knowledge which experience in their respective departments affords; they are the advisers and agents alike of the Secretary of War and of the General in Chief, and upon the proper exercise of their functions, in this twofold relation, depends the harmonious working of the complex system of military administration and command."

This was opposed by most of the heads of the staff departments, and was defended by General Schofield. A part of the discussion, including General Schofield's remarks, was published in the above-mentioned report of the Joint Committee on the Reorganization of the Army (of which General Burnside was chairman), as were also the proposed articles which contained the disputed propositions. In the elaborate bill which was reported by the committee, and which was intended, together with certain unchanged chapters of the Revised Statutes, to be a "condensed and complete military code," the general officers' view was adopted. On a later occasion the relation of the staff departments to the General in Chief was again the subject of consideration, and on this occasion the Secretary of War (Mr. Lincoln) gave his views at some length on the other side of the question, and decided it accordingly.<sup>1</sup>

About this time, namely, August 15, 1876, Congress passed a joint resolution to the following effect:

"Whereas the President was, by an act of Congress, approved March first, eighteen hundred and seventy-five, authorized to make and publish regulations for the government of the Army, in accordance with existing laws; and

<sup>1</sup> For another discussion of the subject of the command of the Army, see an article by General Schofield in the *Century Magazine* for August, 1897. See also "The Command of the Army," in Fry's *Miscellanies*.

In Scott's *Military Dictionary*, published in 1864, we find the following statement: "Administration and command are distinct. Administration is controlled by the head of an executive department of the government, under the orders of the President, by means of legally appointed administrative agents, with or without rank, while command, or the discipline, military control, and direction of military service of officers and soldiers, can be legally exercised only by the military hierarchy, at the head of which is the constitutional commander-in-chief of the Army, Navy, and militia, followed by the commander of the Army, and other military grades created by Congress." (Title "Administration;" and see also titles "Regulations" and "Army Regulations.") Colonel Scott did not recognize the constitutional power of the President to make army regulations.

In England the powers of the "commander-in-chief" (i. e., the commanding general of the army) were at first much more extensive than they are now, in fact the King delegated to him all his own military powers in their full effect, and the commander-in-chief exercised the functions which are now divided between the secretary-at-war and the commander-in-chief. He could frame articles of war; he could order out militia, he granted all commissions, as well of administrative officers as of others, he issued warrants for payments; and he prepared the estimates for the establishment. When a secretary-at-war was appointed he was made subordinate to the commander-in-chief, in fact the latter was independent of all control but that of the sovereign, and was the sole legal and chief of all military organization, administrative as well as disciplinary. (Walton's *History of the British Standing Army, 1660 to 1700*.)

"Whereas by an act of Congress, approved July twenty-four, eighteen hundred and seventy-six, a commission was created to which has been referred the whole subject-matter of reform and reorganization of the Army of the United States; therefore

*"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be requested to postpone all action in connection with the publication of said regulations until after the report of said commission is received and acted on by Congress at its next session."

On the 7th of March, 1878, a bill was introduced in the Senate to provide for a code of army regulations. The bill having been referred to the Secretary of War for such suggestions as he might deem proper, Secretary of War McCrary said that he adhered to the opinion that the President should be authorized to make and publish regulations for the government of the Army, but if it be required that such regulations should be submitted to Congress, to be by that body approved before being issued, he recommended early action.

On the 15th of August, 1878, the clerk of the Committee on Military Affairs of the Senate transmitted to the Secretary of War a copy of a Senate resolution of June 18th, authorizing a subcommittee, for the purpose of considering the revision of the Army Regulations, and stated that he had been directed to cooperate with the War Department in every possible way and to report to the committee the revision of the regulations made under the direction of the Secretary of War. But by act of June 23, 1879 (21 Stats., 34), Congress disposed of the whole matter by authorizing and directing the Secretary of War to cause all the regulations of the Army and general orders then in force to be codified and published to the Army.

The regulations of 1881 were the outcome of this legislation. In July, 1880, a board was convened for the purpose of examining and reporting upon the codification of the regulations made pursuant to its requirements. It consisted of Generals McDowell and Meigs, Colonels Sackett, Hazen, and Upton, with Maj. A. H. Nickerson as recorder. General McDowell was, however, almost immediately relieved and General Auger substituted in his stead. The board received the following instructions, communicated to them by the Adjutant General:

"In submitting the accompanying codification of the laws, regulations, and orders made in pursuance of the requirements of section 2 of an act approved June 23, 1879, the Secretary of War instructs me to say that he desires the board of officers to examine the codification to ascertain whether its parts are consistently arranged; whether there are inaccuracies resulting from misinterpretation; whether there are any repetitions or instances where the phraseology may not clearly express the exact meaning, and that there are no contradictions.

Wherever these defects are discovered it will be the duty of the board to propose a substitute for the defective paragraph and submit it in its report for the Secretary's action.

"It is no part of the functions of the board to *make* regulations, but simply by a careful examination to detect errors and report what changes may be considered requisite for a proper fulfillment of the law under which the codification was made.

"It is the Secretary's desire that when these regulations are published to the Army they shall form as perfect a code as possible and be so free from errors as not to require correction or immediate modification."

On the 13th of September the board was dissolved.

In a note at the beginning of the regulations of 1881 it is stated that "the work of codification was confided to the Adjutant General of the Army," and, in fact, the codification submitted to the board by the Adjutant General (Drum) was prepared by Adjutant General Townsend. A characteristic of these regulations, and one which makes them still valuable, is that they give the source and authority of the individual regulations. An "abridged edition" of them was also issued.

After this no revision of the regulations appears to have been undertaken until December, 1886, when a board was appointed, consisting of General Bonét, Colonel (now General) Otis, Lieut. Col. R. N. Scott, and Lieut. (now Lieut. Col.) George B. Davis, "for the purpose of revising and condensing the regulations of the Army and preparing a new edition of the same." Colonel Scott died two months later. The work of this board finally took the form of the regulations of 1889.

There remains to be considered only the regulations of 1895. General Kelton, in December, 1891, called attention to the necessity of a revision, and in February, 1892, General Schofield wrote as follows:

"The need has become urgent for a new edition of the revised regulations. The need is not so much for any revision of the existing regulations as for a new publication of the regulations as they now exist; that is to say, the regulations of 1889 as revised since their publication. That edition having been very hastily published, and hence very imperfect, it has been amended in so many details and in some cases frequently, that a new publication of the regulations as they exist to-day is of vital importance.

"The revision that has been going on during the last three years, or nearly three years, has involved very great labor and very careful consideration of the several subjects on the part of many officers, including the chiefs of bureaus, the Commanding General, and the



Secretary of War. No much of the regulations as have been so revised ought, in my judgment, not to be changed without cogent reasons.

"The revision of regulations is a very delicate work, and in past experience has generally resulted in an exceedingly imperfect code, requiring numerous amendments. Regulations are a matter of gradual growth, and should be preserved as a rule in the form which has resulted from such growth. In some cases, doubtless, obsolete regulations may be eliminated and others may be somewhat simplified, and some which were carelessly omitted in the last revision should be restored. The officer charged with the revision should be instructed to consider very carefully all such questions, consult the chiefs of bureaus of the War Department, and after obtaining concurrent views upon each question, submit it for the consideration of the Commanding General, and finally for the approval of the Secretary of War, before incorporating it in the revised edition.

"In this way, as suggested by the Adjutant General, a satisfactory work may be accomplished, ready for publication as soon as it is completed and duly indexed."

This revision passed through the hands of Col. (now Adjutant General) H. C. Corbin, Maj. (now Lieut. Col.) J. C. Gilmore, and Maj. (now Lieut. Col.) J. B. Babcock, constituting a board, and afterwards through the hands of the Adjutant General and the Major General Commanding the Army. Gen. E. S. Otis also went over the work. But the preparation of this revision was finally in charge of the Assistant Secretary of War, Maj. (now Lieut. Col.) George W. Davis, and Capt. J. T. French. One of its distinguishing features is that the regulations which relate more particularly to the management of the business of the staff departments, and do not affect the Army at large, are omitted from the general regulations and embodied in separate manuals. Necessarily, however, these manuals cover a wider field than this would indicate. The general Regulations, with their accompaniment of manuals, may be regarded as forming the Regulations of 1895. One of the manuals—the Manual for Courts-Martial—is not, indeed, a staff manual at all, but is a general system of rules for the administration of military justice. It is the first of the kind promulgated by the War Department, and is an outgrowth and enlargement of the directions on the subject which it was formerly the practice to issue from the headquarters of military departments. Regulations, approved by the Secretary of War, had, however, before this been issued by several of the staff departments for their own government.

The regulations for the United States Military Academy also emanate from the President's constitutional power.<sup>1</sup>

"There can be no doubt, however, that within limits, the Superintendent of the United States Military Academy, the same as any officer in control of a public institution peopled with persons whose good conduct is intrusted to his charge, may also lay down rules or regulations. He does in fact exercise this power in issuing certain orders. A distinction has, indeed, been made between regulations and orders, but it can not be said that there is any essential difference between regulations and general orders laying down general rules of action.

As a good illustration of this power, as vested in superintendents of institutions of this character, we may take the various Soldiers' Homes. For these certain regulations are prescribed by statute and others by their boards of managers, necessarily, however, leaving a very considerable residue of matters, principally relating to discipline, to be regulated by the governors of the institutions. It may, of course, sometimes be difficult to decide what the limit of the power is, but that the power exists seems clear. Without it public institutions of this kind could not be controlled, and therefore could not be managed for the purposes for which they are established.

Commanding officers of military posts have this power in a marked degree—limited, it is true, in their case also, by statute and regulation of higher authority, but, subject to these, having a distinct, necessary, and unquestioned jurisdiction. In this case, however, as also in the case of the Superintendent of the Military Academy, the power is a part of an independent system, namely, the military system. But it is the same kind of power. And it is the same kind of power that is exercised by the school teacher in the maintenance of the discipline of his school. "When no rules and regulations have been prescribed by the board, the teacher is authorized to make such reasonable rules as shall best promote the welfare of his school and secure order and discipline therein. And even where rules have been prescribed by the board, the teacher may, unless expressly prohibited, make such additional rules and requirements as special cases or sudden emergencies may render necessary." (*Manual on Public Officers*, 728.) And see *American and English Encyclopedia of Law*, title, "Master and Servant," vol. 14, p. 858.

Ship captains possess this authority in a peculiar degree. Justice Story, discussing the relation of the officers of a ship to the seamen, said:

"The learned counsel for the defendant has asked the court to direct the jury, that the officers of the ship are clothed, not merely with a civil, but with a military power, over the seamen on board. In my judgment, that is not the true relation of the parties. The authority to compel obedience, and to inflict punishment, is, indeed, of a summary character, but, in no just sense, of a military character. It is entirely civil; and far more resembles the authority of a parent over his children, or rather, that of a master over his servant or apprentice, than that of a commander over his soldiers. Properly speaking, however, the authority of the officers over the seamen of a ship, is of a peculiar character, and drawn from the usages, and customs, and necessities of the maritime naval service, and founded upon principles applicable to that relation, which is full of difficulties and perils, and requires extraordinary restraints, and extraordinary discipline, and extraordinary promptitude and obedience to orders." (*United States v. Hunt*, 26 Fed. Cases, 435.)

Commanders of naval vessels possess the power also, and being officers in command of public armed ships they have even greater discretion. (*Wilkes v. Dinsman*, 7 How., 89.)

In a greater or less degree, according to the conditions, the power to make rules of action or regulations can not exist wherever there are rulers and ruled. In military commands the strictest discipline is necessary, and for the purpose of maintaining this discipline a military jurisdiction, or military law, exists, which is quite independent and free from interference within its own special scope. But in a general sense it is certainly true that wherever the relation of ruler and ruled is legally established there must be a power of control, in which, subject to such limitations as may legally be imposed, is included the power to make regulations.

## CHAPTER V.

## THE INTERPRETATION AND CONSTRUCTION OF REGULATIONS.

"Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey." "Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter, of the text."<sup>1</sup>

"There can be no sound interpretation without good faith and common sense. The object of all interpretation and construction is to ascertain the intention of the authors, even so far as to control the literal signification of the words: for *verba ita sunt intelligenda ut res magis valeat quam pereat*. Words are, therefore, to be taken as those who used them intended, which must be presumed to be in their popular and ordinary signification, unless there is some good reason for supposing otherwise, as where technical terms are used: *quoniam in verba nulla est ambiguitas, ibi nulla expositio contra verba fienda est*."<sup>2</sup>

The underlying principles of true interpretation and construction apply to all language, in whatever form it may be used, although there are principles applicable only to its special uses, as in constitutions, statutes, executive regulations, or contracts. The rules for the interpretation and construction of executive regulations closely resemble those for the interpretation and construction of statutes.<sup>3</sup>

1. The first practical question which suggests itself is: Does each

<sup>1</sup> Legal and Political Hermeneutics, by Francis Lieber, pp. 11, 44.

"Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments by the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another, or where it happens that part of a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, then resort must be had to construction, so, too, if required to act in cases which have not been foreseen by the framers of those rules, by which we are nevertheless obliged for some binding reason, faithfully to regulate as well as we can our action respecting the unforeseen case." (Cooley, Constitutional Limitations, 51.)

<sup>2</sup> Francis Lieber, subject, "Interpretation," Bouvier's Law Dictionary.

<sup>3</sup> Devereux (Ct. Cls.), 148.

new edition of the Army Regulations entirely displace the preceding one, both as to the subjects treated of and those omitted?

It is a principle of statutory construction that when the legislature makes a revision of a statute, and frames a new statute upon the subject-matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for the matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded.<sup>1</sup> And this principle is applied to codifications. The general rule seems to be that statutes and parts of statutes omitted from a revision are to be considered as annulled, and are not to be revived by construction.<sup>2</sup> The practice with reference to the different editions of the Army Regulations has conformed to this principle, each new edition being regarded as intended to be a substitute for the preceding one, and to displace it, both as to matter included in both editions, and matter included in the earlier but not in the later edition. It is the substitution of one compilation or system for another.<sup>3</sup>

2. What effect has such a new edition on existing orders relating to subjects covered by it, and on orders prescribing regulations not embodied in it?

The former, it would seem, are displaced by the new code, but the latter not; it being the understanding—subject to which the code is made—that it does not affect orders relating to subjects not embraced in it, nor in the preceding code. Such a question, for example, is understood to have once arisen with reference to General Orders No. 100, of 1863 (Instructions for the Government of the Armies of the United States in the Field), and to have been decided in favor of the permanency of these regulations.

The non-user of a statute does not repeal it, although it has been said that, on the principle that custom is of great force in the construction of statutes, long and uniform disuse might in some cases amount to a practical repeal. This would seem to apply even more strongly to regulations, which are made and executed by the same authority. The circumstances may be such that the long-continued disuse of a regulation would be significant of the understanding of the executive authority that it has become obsolete and inoperative.

3. The effect of the revocation of an army regulation by which a preceding regulation was revoked.

The principles regulating this differ somewhat from those of statutory construction. The latter have been thus stated:

“Where an act is repealed, and the repealing enactment is repealed

<sup>1</sup> *Bracken v. Smith*, 39 N. J. Eq., 169.

<sup>2</sup> *Enfield*, *Interpretation of Statutes*, § 202.

<sup>3</sup> 17 *Opin. Atty. Gen.*, 463.



by another, which manifests no intention that the first shall continue repealed, the common-law rule was (and in the absence of any statutory declaration to the contrary, the general rule still is), that the repeal of the second act revives the first; and revives it, too, *ab initio*, and not merely from the passing of the reviving act. (The revival of the original statute is also, in general, the effect of the expiration of a repealing statute by its own limitation, or of the suspension of the repealing act; and it is immaterial whether the repeal of the repealing act be express or by implication. Moreover, it extends, not only to statutes, but to the common law; so that, where an act superseding in any particular the common-law rule previously applicable is repealed, that rule is held to be revived. The doctrine stated is, however, not without exceptions, founded in the necessity of giving effect to the legislative intent. Thus, it is said that an absolute affirmative repeal of a statute by a subsequent one will survive the expiration of the latter by its own limitation; that the repeal of a statute which was a revision of, and which was intended as a substitute for, a former act to the same effect, will not revive the latter, such a result being manifestly contrary to the intent of the legislature; and that, for the same reason, the repeal of an act "amending another 'so as to read' in a given manner, which operates as a total merger of the amended act in the amending one, cannot revive the original statute.") (Endlich, Interpretation of Statutes, §. 475.)

But with reference to army regulations it would seem to be an established usage that the revocation of a regulation or an order, by which a preceding regulation or order was revoked, will not revive these, unless there be some express evidence of such an intention. This usage is no doubt founded on the necessity of certainty.

The revocation of a regulation which is simply declaratory of an established custom of the service would, however, in the absence of words indicating a different intention, doubtless be held to leave the custom in force. For example, a regulation of the Manual for Courts-Martial, which constitutes a part of the Army Regulations, says that the judge-advocate of a court-martial swears the witnesses. This is declaratory of the custom of the service, for the ninety-second article of war, which prescribes the oath to be administered to witnesses, does not say by whom it shall be administered. Undoubtedly, the revocation of the regulation would leave the custom of the service in force.

4. *Expressio unius est exclusio alterius.* This rule applies in the construction of the Army Regulations, as well as in the construction of statutes. Where, for example, certain allowances are specified, other allowances for the same thing are excluded. Thus, it has been held by the War Department that the very fact that the Army Regu-

lations do not provide for certain allowances claimed, raises a presumption that it was not the intention, when army regulations were published and promulgated by the direction of the Secretary of War, to make such allowances.<sup>1</sup>

But, apparently, even in the matter of allowances, a regulation, which has not been approved by Congress and is not made pursuant to an act of Congress, may be modified in a particular case, or the case may be taken out of its operation. Thus, it was held by the Assistant Comptroller of the Treasury (Mr. Bowers), with reference to the regulation prohibiting the reimbursement of Army officers who, when changing station, ship and pay for the transportation of their baggage, that "as the regulation was made by the Secretary of War, that officer has the power to amend it, or to waive its provisions in particular cases, but so long as the regulation stands as it does, no reimbursement can rightfully be made without the specific waiver of the regulation by the Secretary of War, when shipments are made by officers."<sup>2</sup> It is to be observed, however, that the Assistant Comptroller did not here make any distinction between regulations made pursuant to, or in execution of, a statute—in this case an appropriation act—and other regulations.

5 In construing army regulations it is often necessary to consider to which of the classes named at the beginning of this work they belong; *i. e.*, those which have been approved and adopted by Congress; those made pursuant to, or in execution of, a statute; and those made by the President as commander-in-chief, but not falling under either of the other heads.

(a) Those which have been approved and adopted by Congress. These can not be modified or amended until the Congressional sanction has been removed. (See *ante*.)

(b) Those made pursuant to, or in execution of, a statute. These may be modified or amended, but individual exceptions to them can not be made. (See *ante*.)

(c) Those made by the President as commander-in-chief, and not falling under (a) or (b). These may be modified, and exceptions to them may be made. (See *ante*.)

We are ordinarily in the habit of regarding the different paragraphs of the Army Regulations as on the same footing in this respect, that is to say, as having the same degree of immutability; but this is, for the reason stated, believed to be a mistake likely to lead to faulty action. When we are considering the power of the President to modify, or make

<sup>1</sup> Claim of Captain Morton.

<sup>2</sup> 3 Comp. Dec., 305.

an exception to, a regulation, we ought to know to which of the above classes it belongs.

6. Authentic interpretation and construction.

"Authentic interpretation is called that which proceeds from the author or utterer of the text himself; properly speaking, therefore, it is no interpretation, but a declaration. If a legislative body, or monarch, give an interpretation, it is called authentic, though the same individuals who issued the law to be interpreted may not give the interpretation; because the successive assemblies or monarchs are considered as one and the same, making the law and giving the interpretation in their representative, and not in their personal characters. Authentic interpretation, therefore, need not always be correct, though it has, if formally given, binding power. Still it may be reversed by a subsequent law."<sup>1</sup>

In 1861 and 1862 the pay of officers of the Army was made up of pay proper and certain allowances, one of which was for a certain number of servants at the rate of pay, etc., of private soldiers. In 1861 the pay of private soldiers was increased, and in 1862 it was enacted that the legislation making this increase "shall not be so construed, after the passage of this act, as to increase the emoluments of the commissioned officers of the Army." This was an instance of authentic legislative construction. Executive construction of regulations is much more common, and is not limited to cases arising subsequently to the construction, but, on the contrary, is applied to existing cases. Because of this, and because there is in general no remedy in the nature of an appeal, it is incumbent on the authority construing the regulation to take great care to construe correctly.

7. Army regulations, like statutes, are not to be given a retroactive effect unless their language clearly requires it. (*United States v. Webster*, 25 Fed. Cases, 509; *United States v. Davis*, 132 U. S., 334; § 494, p. 140, *ante*.) We must, however, make an exception to this rule in favor of curative and declaratory regulations, the former being intended to cure matters of form, and the latter being explanatory of other regulations. But the presumption always is that the intention of the regulation is to lay down a rule for the future. If the intention is to give it a retroactive effect, it must clearly appear. This is applying to executive regulations a familiar rule of statutory construction.

"It is a proposition too well settled by authority to admit of dispute, or call for extended discussion, that curative acts, especially upon matters of public concern, are to be allowed the retroactive effect they are

<sup>1</sup> Lieber's *Hermeneutics*, p. 62.

clearly intended to have, even though vested rights and decisions of courts be set aside by them, so long as they do not undertake to infuse life into proceedings utterly void for want of jurisdiction, and do not contravene the constitutional provisions against laws impairing the obligation of contracts and ex post facto laws, or any other provision of the particular constitution to which the legislature passing them may be subject. The purpose of these sections is merely to point out the effect, upon the construction of such, and acts declaratory of former statutes or rules of law, of the presumption against an intention to legislate retrospectively, and, possibly, of a constitutional prohibition against retrospective operation in the particular class of cases to which the act is to be applied, coupled with the necessity of giving, if practicable, a lawful and reasonable operation to the expression of the legislative will." (Endlich, Interpretation of Statutes, § 291.)

These principles apply, *mutatis mutandis*, to executive regulations. But it would be a violation of principles of a much higher degree of obligation, if they were to be resorted to in disregard of those mentioned in rule 4 and at the beginning of these remarks. Such a violation could not, indeed, be properly regarded as curative or declaratory.

8. The Army Regulations are, as the order of promulgation by the Secretary of War announces, "regulations for the Army." Their provisions would not relate to the business of the War Department, unless it should expressly appear that such is the intention. Thus, it was held that paragraph 679, Army Regulations, only relates to the public property in the custody of the military establishment, and does not relate to the property held by the War Department proper, which is a civil institution, quite distinct from the military, and to which, in the absence of express words to that effect, the regulation mentioned does not apply. (Opin. Judge-Advocate General, January 10, 1898.)

9. Executive regulations are not in general imperative, so as to render actually invalid acts provided for by the regulations, but done without a compliance with their requirements. They are in general directory only. In this respect they resemble statutory rules for the performance of public duties. To affect with invalidity acts done in neglect of such rules would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the legislature. In such case, they are said not to be of the essence, or substance of the thing required; and, depending upon this quality of not being of the essence or substance of the thing required, compliance being rather a matter of convenience, and the direction being given with a view simply to proper, orderly, and prompt conduct of business, they seem to be generally understood as mere instructions for the guidance and gov-



ernment of those on whom the duty is imposed, or, in other words, as directory only. (Endlich on Interpretation of Statutes, § 436.)

In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be clearly gathered from the statute construed in the light of other rules of interpretation. (*Id.*, § 437.)

A provision in a statute, rule of procedure, or the like, is said to be directory when it is to be considered as a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision which must be followed. The general rule is that the prescriptions of a statute relating to the performance of a public duty are so far directory that, though neglect of them may be punishable, yet it does not affect the validity of the acts done under them, as in the case of a statute requiring an officer to prepare and deliver a document to another officer on or before a certain day. (Black's Law Dictionary.)

Many statutory requisitions, intended for the guidance of officers in the conduct of business, do not limit their power or render its exercise in disregard of the requirements ineffectual. Such are regulations designed to secure order, system, and dispatch in proceedings. Provisions of this character are not mandatory unless accompanied by negative words importing that the acts shall not be done in any other manner or time than that designated. (Anderson's Law Dictionary.)

As with statutes, so with executive regulations, when it is the intention that acts shall be invalid unless done in the way prescribed, and therefore the way prescribed is of the essence of the regulation, the regulation is imperative, and not merely directory.

These rules have been applied in the construction of army regulations. So held with reference to paragraph 746 of the Army Regulations of 1889, forbidding purchases of supplies to be made from, or contracts for supplies or services to be made with, persons in the military service, that it was directory merely, and that a contract might still be legal and binding, though entered into in contravention of its terms. (See § 958, page 273, *ante.*) But a regulation which has been adopted by Congress, even though directory only, should not be deliberately set aside, any more than the directory requirements of a statute. Nor should a directory regulation made pursuant to or in aid of a statute be deliberately repudiated in an individual case. Such action would be unauthorized (and destructive to system), although the thing done would not thereby be rendered invalid. It has been held by the War Department that certain regulations

made for the purpose of carrying out the law with reference to appointments from the ranks, and which prescribe requirements relating to the examination of candidates, can not be set aside in individual cases. This decision is manifestly correct, whether it rests on the ground that the regulations were intended to be imperative, or on the ground that the Department has no authority thus, in individual cases, to set aside regulations made pursuant to a statute, even though they be directory only.<sup>1</sup>

10. When there is a doubt as to the meaning of a regulation, reference may be had to the order, if any there be, on which it is based, for an explanation of the doubtful language. This is an application of a rule of statutory construction. Thus, Justice Miller, speaking of the Revised Statutes of the United States, said:

"Where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the 1st day of December, 1873. When the meaning is plain, the courts can not look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress." (*United States v. Bowen*, 100 U. S., 513.)

So, where there is a doubt as to the meaning of a regulation, reference may be had to the antecedent history of the subject. This is not uncommonly a source of information in the construction of regulations, and recourse is often had to it as a matter of historical illustration and confirmation, even when the language of the regulation is entirely free from doubt.

11. "He knows not the law who knows not the reason for the law." In construing a regulation the reason for it may be taken into account, and cases excluded from it which, although within the letter of the regulation, are not within the reason for it. This also is the application of a principle of statutory construction. "It is a familiar rule," say the Supreme Court, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad

<sup>1</sup> See G. C. M. O. No. 27, Navy Dep't, 1898.

meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."<sup>1</sup>

12. When the punctuation is such as to interfere with true interpretation, it should be disregarded. This rule of statutory interpretation is applicable to the interpretation of regulations. But the evidence of the interference should be clear. As stated by Black and the authorities cited by him: "In the interpretation of written instruments, very little consideration is given by the courts to the punctuation, and it is never allowed to interfere with or control the sense and meaning of the language used. The words employed must be given their common and natural effect, regardless of the punctuation or grammatical construction; and considerations based on the punctuation alone must never be allowed to violate the well-settled rule that, where it is possible, effect must be given to every sentence, phrase, and word, and the parts must be compared and considered with reference to each other. Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.

"If, therefore, the words of the act, taken in themselves alone, or compared with the context and read in the light of the spirit and reason of the whole act, convey a precise and single meaning, they are not to be affected by the want of proper punctuation or by the insertion of incorrect or misplaced marks."<sup>2</sup>

"Punctuation in written instruments may sometimes, in cases of ambiguity, shed light upon the meaning of the parties, but it is never allowed to overturn what seems the plain meaning of the whole instrument. It may be resorted to when all other means fail."<sup>3</sup>

13. The Army regulations consist of a great number of individual regulations, derived from a great variety of sources, and reduced to words by many different persons. They, to a large extent, relate to the business of the different staff departments of the Army, the regulations relating to one department often not affecting others. Words may sometimes, in consequence of this, be differently used in different connections, or, perhaps, with meanings qualified by their surroundings. The rule of statutory construction, *Noscitur a sociis*, here applies. To illustrate: Paragraph 771, of the Army Regulations of 1889, prescribed that affidavits or depositions might be taken before certain military officers, without specifying in what cases. According to the language of this paragraph, taken by itself, these officers were

<sup>1</sup> 143 U. S., 459.

<sup>2</sup> Black's Construction and Interpretation of the Laws, p. 186.

<sup>3</sup> Am. and Engl. Enc. of Law, vol. 11, p. 521, and authorities cited.

given the power to take affidavits and depositions (which was held to include the administering of oaths) for all purposes whatsoever; but, as the paragraph was amongst other paragraphs, and in an article, relating to property accountability, it was evidently the intention to confer the power (an excess of authority even then) only for the purpose of accounting for public property in the custody of the military establishment. The meaning of the paragraph was determined by its surroundings.

14. As with statutes, so with executive regulations, contemporaneous construction, and official usage for a long period, by the persons charged with their administration, are among the legitimate aids in determining their meaning. By contemporaneous construction is meant that put on the regulation at the time that it was made. As usage under a regulation is generally founded on contemporaneous construction, these, thus united, should ordinarily be considered as conclusive; except, of course, when the question is as to a conflict between the regulation and some superior rule of action.<sup>1</sup>

In the administration of military affairs, as in other branches of government, precedents are of great value, and an authoritative construction, once given to a regulation, should thereafter receive great weight. *Stare decisis, et non quicquam movere*, is a maxim applicable to constructions of regulations by the Executive, as well as to constructions of law by the courts. To change the accepted meaning of a regulation by a new construction is disturbing, and should be avoided. It is preferable to change the regulation itself when that can be done.

We see it sometimes announced that the action taken in a case will not be followed as a precedent. This is scarcely more than a declaration of a present intention in regard to future action, and as such affects only the authority making it, and is not even legally binding on him. If the thing done be within the legal power of the authority doing it, it will be a precedent, although, perhaps, weakened by the circumstances of the case. Accordingly, we find precedents of this kind cited, notwithstanding the announcement that the action taken is not to be so regarded.

But it is not the object of these remarks to treat the subject of the construction of regulations at any length. All that has been attempted has been to point out a few of the most important principles. For the rest it may be said that in general the rules of statutory construction will be safe guides.

<sup>1</sup> Under the head of, "Principles governing Regulations," Colonel Winthrop, in his work on Military Law, points out and discusses the following rules.

1. They must not contravene existing law.
2. They must not legislate.
3. They must confine themselves to their subject.
4. They must be uniform.
5. They should be equitable.



## APPENDIX B.

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### THE USE OF THE ARMY IN AID OF THE CIVIL POWER, BY G. NORMAN LIEBER, JUDGE-ADVOCATE GENERAL, U. S. ARMY, 1898.

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By the use of the Army in aid of the civil power is here meant its use under some power granted by the Constitution of the United States, either directly or through the medium of legislation. "War powers," independent of the Constitution, whatever they may be, and whether legislative or executive, are no part of this subject.<sup>1</sup> The use here spoken of has reference to the occasions for the employment of the Army, that is, to the purposes for which it may be used, and not to what it may do in carrying out the use. The occasions had in view are those of resistance to the law not amounting to war, and the subject to which these observations will be more especially addressed is the employment of the Army in executing the laws of the United States and in protecting their instrumentalities of government against unlawful interference.

The Army Appropriation Act of June 18, 1878, contained the following provision:

"From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a *pars compitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this

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<sup>1</sup> The North American Review for November, 1896, publishes the writer's views on what constitutes the justification of the war power known as "martial law." The position is there taken that martial law is defensible only as an exercise of executive military power founded in actual necessity, thus disagreeing with the view, sometimes advanced, that it is within the power of Congress to authorize it.

section and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment."

From June 30th until November 21st, 1877, the Army of the United States was maintained without any appropriation, the two Houses of Congress having failed to agree. It would be foreign to the purpose of these remarks to comment on this significant fact in our constitutional history, but the proceedings in Congress which led to the failure of the Army Appropriation Act at the second session of the Forty-fourth Congress, and those which resulted in the above legislation, are part of the history of the subject under consideration.

On the 22d of January, 1877, the President, in response to a resolution of the House of Representatives, made the following communication:

*"To the House of Representatives:*

"On the 9th day of December, 1876, the following resolution of the House of Representatives was received, viz:

*"Resolved,* That the President be requested, if not incompatible with the public interest, to transmit to this House copies of any and all orders or directions emanating from him or from either of the Executive Departments of the Government to any military commander or civil officer, with reference to the service of the Army, or any portion thereof, in the States of Virginia, South Carolina, Louisiana, and Florida, since the 1st of August last, together with reports, by telegraph or otherwise, from either or any of said military commanders or civil officers."

"It was immediately, or soon thereafter, referred to the Secretary of War and the Attorney General, the custodians of all retained copies of 'orders or directions' given by the Executive Department of the Government covered by the above inquiry, together with all information upon which such 'orders or directions' were given.

"The information, it will be observed, is voluminous, and, with the limited clerical force in the Department of Justice, has consumed the time up to the present. Many of the communications accompanying this have been already made public in connection with messages heretofore sent to Congress. This class of information includes the important documents received from the governor of South Carolina, and sent to Congress with my message on the subject of the Hamburg massacre; also the documents accompanying my response to the resolution of the House of Representatives in regard to the soldiers stationed at Petersburg.

"There have also come to me and to the Department of Justice, from time to time, other earnest written communications from persons holding public trusts and from others residing in the South, some of which I append hereto as bearing upon the precarious condition of the pub-

lie peace in those States. These communications I have reason to regard as made by respectable and responsible men. Many of them deprecate the publication of their names as involving danger to them personally.

"The reports heretofore made by committees of Congress of the results of their inquiries in Mississippi and in Louisiana, and the newspapers of several States recommending 'the Mississippi plan,' have also furnished important data for estimating the danger to the public peace and order in those States.

"It is enough to say that these different kinds and sources of evidence have left no doubt whatever in my mind that intimidation has been used, and actual violence, to an extent requiring the aid of the United States Government, where it was practicable to furnish such aid, in South Carolina, in Florida, and in Louisiana, as well as in Mississippi, in Alabama, and in Georgia.

"The troops of the United States have been but sparingly used, and in no case so as to interfere with the free exercise of the right of suffrage. Very few troops were available for the purpose of preventing or suppressing the violence and intimidation existing in the States above named. In no case except that of South Carolina was the number of soldiers in any State increased in anticipation of the election, saving that twenty-four men and an officer were sent from Fort Foote to Petersburg, Va., where disturbances were threatened prior to the election.

"No troops were stationed at the voting-places. In Florida and in Louisiana, respectively, the small number of soldiers already in the said States were stationed at such points in each State as were most threatened with violence, where they might be available as a *parade* for the officer whose duty it was to preserve the peace and prevent intimidation of voters. Such a disposition of the troops seemed to me reasonable, and justified by law and precedent, while its omission would have been inconsistent with the constitutional duty of the President of the United States 'to take care that the laws be faithfully executed.' The statute expressly forbids the bringing of troops to the polls, 'except where it is necessary to keep the peace,' implying that to keep the peace it may be done. But this even, so far as I am advised, has not in any case been done. The stationing of a company or part of a company in the vicinity, where they would be available to prevent riot, has been the only use made of troops prior to and at the time of the elections. Where so stationed, they could be called, in an emergency requiring it, by a marshal or deputy marshal as a *parade* to aid in suppressing unlawful violence. The evidence which has come to me has left me no ground to doubt that if there had been more military force available, it would have been my duty to have disposed of it in several States with a view to the prevention of the violence and intimidation which have undoubtedly contributed to the defeat of the election law in Mississippi, Alabama, and Georgia, as well as in South Carolina, Louisiana, and Florida.

"By Article IV, section 4, of the Constitution, 'The United States shall guarantee to every State in this Union a republican form of government, and on application of the legislature, or of the executive

(when the legislature can not be convened), shall protect each of them against domestic violence."

"By act of Congress (Rev. Stat., U. S., sec. 1034, 1035) the President, in case of 'insurrection in any State,' or of 'unlawful obstruction to the enforcement of the laws of the United States by the ordinary course of judicial proceedings,' or whenever 'domestic violence in any State so obstructs the execution of the laws thereof, and of the United States, as to deprive any portion of the people of such State' of their civil or political rights, is authorized to employ such parts of the land and naval forces as he may deem necessary to enforce the execution of the laws and preserve the peace, and sustain the authority of the State and of the United States. Acting under this title (69) of the Revised Statutes, United States, I accompanied the sending of troops to South Carolina with a proclamation such as is therein prescribed.

"The President is also authorized by act of Congress 'to employ such part of the land or naval forces of the United States' 'as shall be necessary to prevent the violation and to enforce the due execution of the provisions' of title 24 of the Revised Statutes of the United States for the protection of the civil rights of citizens, among which is the provision against conspiracies 'to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for President, or Vice-President, or as a member of the Congress of the United States.' (Rev. Stat., U. S., 1989.)

"In cases falling under this title, I have not considered it necessary to issue a proclamation to preclude or accompany the employment of such part of the Army as seemed to be necessary.

"In case of insurrection against a State government, or against the Government of the United States, a proclamation is appropriate; but in keeping the peace of the United States at an election at which members of Congress are elected, no such call from the State or proclamation by the President is prescribed by statute or required by precedent.

"In the case of South Carolina, insurrection and domestic violence against the State government were clearly shown, and the application of the governor founded thereon was duly presented, and I could not deny his constitutional request without abandoning my duty as the Executive of the National Government.

"The companies stationed in the other States have been employed to secure the better execution of the laws of the United States and to preserve the peace of the United States.

"After the election had been had, and where violence was apprehended by which the returns from the counties and precincts might be destroyed, troops were ordered to the State of Florida, and those already in Louisiana were ordered to the points in greatest danger of violence.

"I have not employed troops on slight occasions, nor in any case where it has not been necessary to the enforcement of the laws of the United States. In this I have been guided by the Constitution and the laws which have been enacted and the precedents which have been formed under it.



"It has been necessary to employ troops occasionally to overcome resistance to the internal-revenue laws, from the time of the resistance to the collection of the whisky tax in Pennsylvania, under Washington, to the present time.

"In 1854, when it was apprehended that resistance would be made in Boston to the seizure and return to his master of a fugitive slave, the troops there stationed were employed to enforce the master's right under the Constitution, and troops stationed at New York were ordered to be in readiness to go to Boston if it should prove to be necessary.

"In 1859, when John Brown with a small number of men made his attack upon Harper's Ferry, the President ordered United States troops to assist in the apprehension and suppression of him and his party, without a formal call of the legislature or governor of Virginia, and without proclamation of the President.

"Without citing further instances, in which the Executive has exercised his power as commander of the Army and Navy to prevent or suppress resistance to the laws of the United States, or where he has exercised like authority in obedience to a call from a State to suppress insurrection, I desire to assure both Congress and the country that it has been my purpose to administer the executive powers of the Government fairly, and in no instance to disregard or transcend the limits of the Constitution.

"U. S. GRANT."

The bill passed the House of Representatives at the second session of the Forty-fourth Congress proposed to reduce the numerical strength of the Army and to prevent its use in support of the claims, or pretended claims, of any State government or officer, until such government should be duly recognized by Congress. The reason assigned for this was the improper use of the Army in the Southern States. Thus, Mr. J. D. C. Atkins, a member from Tennessee, said:

"Had the people been allowed without Federal coercion to manage their own affairs since the war, they would have done so much more justly to all concerned and with far greater satisfaction to a very large majority of the people even of the Northern States.

"The disrupted condition of society which the war left among other evils as a heritage to the South, and which almost always follows civil wars from necessity, afforded a pretext for the use of the Army in those States. And as the dominant party determined to tear down the old State governments and also the new ones which were set up by President Johnson and enter upon its famous and ill-advised reconstruction policy—and I only speak of it now for the purpose of a historical illustration—and to do this were compelled to inaugurate the rotten-borough or carpet-bag system of representation and government, which required, or they supposed it did, the presence of the Army to make it successful, time, partial success, and habit have rendered the use of the Army in the Southern States a seeming necessity

to the ruling authorities at Washington. It is to this use of the Army that I object. It is degrading to the dignity of an American soldier to make a policeman of him; it is insulting to his chivalry and patriotism, it is dwarfing his noble profession to the ignoble level of a Turkish Janizary, who never tasted the sweet waters of liberty, but was born and bred beneath the frowning shadows of despotism and thinks it an honor to lick the hand of his master, or but touch the hem of his garment, or die for his defense.

"American soldiers policemen! Insult if true, and slander if pretended to cover up the tyrannical and unconstitutional use of the Army by protecting and keeping in power tyrants whom the people have not elected; and but for Federal military protection their governments would fall at the first breath of popular expression. The hollow insincerity and circumlocution which attended every step of the unconstitutional use of the United States Army deserves the scorching denunciation of every true soldier and of every lover of his country and of its Constitution.

"The process has been to first stifle the lawful will of the people and set up in power these minions of despotism. This has been done by driving at the point of the bayonet the legally elected legislators and officers of those States from power. United States district judges have been invoked to violate the law and issue orders wholly illegal and unconstitutional, under which pretended judicial authority these unpardonable outrages upon civil liberty have been committed. In this manner these pretenders becoming the *de facto* governments, the President then virtuously and patriotically responds to their call for troops to protect them in their infamous assumption of authority. When this point is reached the law-abiding Executive, full of devotion to the Constitution and with a heart always yearning for peace, armed with magisterial power, recurs to the fourth section of the fourth article of the Constitution with infinite satisfaction, and forthwith military aid is afforded the men whom he, in violation of the Constitution, first created with his own usurping hand. Such has been the process.

"The last section of this bill seems to me to be a very salutary one. It provides that no part of the money appropriated by it shall be used in any State to maintain the political power of any State government, but to leave the people of a State perfectly free to regulate their own affairs in their own way, subject to the Constitution of the United States."

And when the bill was before the Senate Mr. Bayard said:

"It is not merely the cost of the Army; it is the question of the *employment of the Army*. That is the cause of the deep feeling which pervades the people of this country to-day, and which forms the chief

difference between the two Houses of Congress in respect to the present bill. It is not worth while to attempt to disguise it; the fact is that a widespread belief exists that the Army of the country has been employed and is still being used for purposes dangerous to the liberties of the country. That forms the objection to the increase of the military establishment and forms the reasons for the reduction proposed by the Representatives of the people. I only speak of that which we all know, which the whole country knows, of the improper uses to which the Army has been put in certain States of the Union during the last few years.

It is now apparent that the outgoing administration tardily admit this policy in the use of the Army to have been a serious mistake and it seems are taking steps to abandon it. We hear something of a similar suggestion, a faint adumbration of opinion, from the incoming administration that they are in accord with these last expressions of opinion on the part of the present administration. I sincerely hope this may be so. In my judgment it would have been wiser had the House of Representatives moved directly, not by way of lessening appropriations, but directly, for the repeal of all those war measures authorizing the use of the Army in the several States which have found place upon our statute books in the last fifteen years. The use of military force of the nation for the execution of the laws should certainly be the very last resort, and not, as of late years, the very first. I hope the day is near at hand when we shall repeal all this military legislation which has sprung up under a semirevolutionary condition of affairs, and permit us to return where the Constitution intended our administration of government should be restricted, only to enforce laws by the military power as a last resort, and even when the military power was called in in aid of the civil power it was to be the militia of the States, and not the Army of the nation.

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After all, the cure for such evils must be in the public opinion of an intelligent and courageous people, and that public opinion will practically enforce itself upon the exigencies of the occasion. We know there were emergencies, ten or twelve years ago, which, thank heaven, no longer exist, and there can be no doubt that laws for which there was a pretext or a real cause at that time are no longer the meet and proper laws for a peace establishment. It is not the size of the Army, it is the *use* to which the Army is applied; it is the extraordinary laws under which the Army can be unjustly used and has been used. It is the repeal of those laws that I seek, in order that the country may be put *in statu quo ante bellum*. It is that the use of the military as an aid to civil power should be the very last resort in a

government of laws, and that, under our system, where the laws are to be enforced in aid of the State, the State militia, and not the Army of the United States, should be called upon."

The Senate passed a substitute for the House bill, leaving the Army on its existing footing, and omitting the provision restricting its use. The house thereupon refused to concur in the amendments, and the bill failed to become a law; the Army Appropriation Act for the fiscal year ending June 30th, 1878, not being passed until November 21st, 1877.

Similar debates were had the next year. Mr. Wm. Kimmel, a member from Maryland, then very fully discussed the subject of the employment of the Army to execute the laws, and offered the following as an amendment to the Army Appropriation Act: "*Provided*, That from and after the passage of this act it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a *posse comitatus* or otherwise, except in such cases as may be expressly authorized by act of Congress" language substantially the same as that finally enacted, except in one important particular, namely, the recognition by the final enactment of the fact that there is self-acting authority in the Constitution for the employment of the Army. This clause received earnest consideration in the Senate, where it was amended so as to contain such recognition. "As a matter of course," said Mr. Windom, "you can not limit the power of the President as authorized and granted by the Constitution."

The debate was an interesting one, but too long to follow in detail.<sup>1</sup> An attempt was made to strike out the word "expressly," but that failed. But, manifestly, the clause as enacted, recognizes the Constitution as a direct source of authority for the employment of the Army. This is a very important consideration in the construction of the legislation. And another matter of great importance is also to be observed with reference to it. The enactment prescribes that it shall be unlawful to employ any part of the Army as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except when it is *expressly* authorized by the Constitution or by act of Congress. Now, it is evident that the word "expressly" can not be construed as placing a restriction on any constitutional power. If authority so to use the Army is included in a constitutional power, although it be not expressly

When the bill was reported from the conference committee, Mr. Hewitt, of New York, who had charge of it, said:

"Thus have we this day secured to the people of this country the same great protection against a standing army which cost a struggle of two hundred years for the Commons of England to secure for the British people."

A strong expression of the feeling existing at that time.



named, it can not, of course, be taken away by legislation. So that, so far as any such constitutional power is concerned, the clause must be read as though the word "expressly" were omitted. Nor, indeed, would the enactment qualify future legislation, if it should be manifest that the intention of the later legislation is to confer the authority. But the intention would have to be very evident, because the presumption would be that the later legislation is intended to be controlled by the earlier.

Among the acts of Congress regarded as expressly authorizing the employment of the Army in executing the laws, was the act of February 25, 1865, embodied in section 2002 of the Revised Statutes, forbidding the use of troops at any place in a State where an election should be held, unless it should be necessary "to repel the armed

<sup>1</sup> Ex-Attorney General Miller, in a letter to Attorney General Olney, dated July 11, 1894, said:

"Without assuming that what I may say or think is of any special value, I beg to say that what you have done and what you have said, so far as the same has been brought to my attention, in connection with the current strike and labor troubles, has my cordial commendation and is, as I think, entitled to the approval of all good citizens. That the President has the authority and that it is his duty to use the whole power of the Government for the enforcement of the laws of the United States seems to me to be axiomatic. It is made his duty to take care that the laws be faithfully executed. He is made Commander-in-Chief of the Army and Navy. In my judgment, the power thus conferred is given in order that he may execute the duty thus imposed. For this reason, I have always been of the opinion, and so advised President Harrison, that the *posse comitatus* statute, in so far as it attempted to restrict the President in using the Army for the enforcement of the laws, was invalid, because beyond the power of Congress, that it was no more competent by a statute to limit the power of the President, as commander-in-chief, to use the Army for the enforcement of the laws than it is competent to limit by statute the exercise of the pardoning or appointing power. Holding these views, I repeat that I have been gratified at the decision and vigor with which the President's power as commander-in-chief has been exercised, as I think I may justly assume, under your advice." (H. R. Doc. 9, Part 2, 54th Cong., 2d sess., p. 108.)

Pomeroy divides the executive attributes and functions under the Constitution into three classes, viz. First, those which are completely conferred by the terms of the organic law; secondly, those which depend upon some prior statute of Congress for the opportunities and occasions upon which they may be exercised, and, thirdly, those which depend upon some prior laws of Congress, not only for the opportunities and occasions for their exercise, but for their number, character, and scope. And he says: "So far as the President has executive functions directly conferred upon him, he is independent of Congress. It was never intended that the legislature should draw to itself the duty of administering the laws which it makes. There is danger, it can not be doubted, lest the Congress should trench upon the attributes of the Executive. This is not done by interfering with the class of powers first above stated (secs. 635, 636). The subject-matter of these powers lies so plainly beyond the sphere of the legislature, that any assertion of jurisdiction over them is hardly to be anticipated. The tendency, if it exists at all, is to control the President in the exercise of his functions of the second class (sec. 637) or to commit those of the third class (sec. 638) to subordinates, and to limit and restrain the President in any practical exercise over those subordinates, of his power to take care that the laws be faithfully executed." I need hardly say that such legislation is opposed to the spirit of the organic law and if it became general, would break down the independence of the Executive, and practically reduce the Government to a single political branch." (Pomeroy's Constitutional Law, 537, *et seq.*)

enemies of the United States, or to keep the peace at the polls." In the Army Appropriation Act of June 23, 1879, it was prescribed that no money appropriated by the act should be used "for the subsistence, equipment, transportation, or compensation of any portion of the Army of the United States, to be used as a police force to keep the peace at the polls at any election held within any State." And the Army Appropriation Act of the following year contained a similar provision, with a proviso to the effect that nothing in it should be construed to prevent the use of troops "to protect against domestic violence in each of the States on application of the legislature thereof or of the executive when the legislature can not be convened." This legislation was adopted in view of the existing law, authorizing the use of troops to keep the peace at the polls.<sup>1</sup> The latter was expressly repealed February 5th, 1894.

The use of the Army as a *posse comitatus* has undoubtedly been, for the present, done away with by the legislation of 1878. The Constitution does not authorize its use in this way, and there is no act of Congress expressly authorizing it.<sup>2</sup> Formerly it was regarded as entirely legal that it should be so used. "The *posse comitatus*," said Attorney General Cushing, "comprises every person in the district or county above the age of fifteen years, whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus*. (XXI Parl. Hist., pp. 672, 688, per Lord Mansfield.)"<sup>3</sup> It is to be noticed that Mr. Cushing held that the military forces were bound to obey the commands of the sheriff, as well as those of the marshal, while Attorney General Devens seems to have been of the opinion that even the marshal had the right to summon

<sup>1</sup> See President Hayes's messages of April 29, 1879, in regard to the Army Appropriation Act, and of May 12, 1879, in regard to a bill "to prohibit military interference at the polls."

<sup>2</sup> By section 1984, Revised Statutes, commissioners charged with certain duties under the Civil Rights legislation are empowered "to summon and call to their aid the bystanders or *posse comitatus* of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged." It will be noticed that the land and naval forces are here spoken of as quite distinct from the *posse comitatus*. It is also to be noticed that the occasions for the use of troops under this section have been greatly reduced by the repeal of the provisions of the Revised Statutes relating to crimes against the elective franchise. And in no case has the commissioner a direct control over the troops. This would be unconstitutional.

<sup>3</sup> 16 Opin. Atty. Gen., 473. See also 16 *Id.*, 463, and the instructions of Attorney General Evans and Taft to United States marshals, of date August 20th, 1868, and September 7th, 1876, respectively.

them as a *posse comitatus* only when they could be spared.' Having in mind the independence, and freedom from interference by the States, of the instrumentalities of the Government of the United States, it would appear that the Army could never have been subject to the summons of the sheriff. But in view of the act of Congress of 1878, this question is not now of any practical importance.

Called forth by the use of the Army in the political affairs of the Southern States, the legislation of 1878 was given a very general effect, and entirely abolished its use as a *posse comitatus*—a very desirable result, it is believed. Further than this, it required that when authority to use the Army in the execution of the laws is given by statute it shall be done in express terms. Legislation of this kind is found in an act of Congress of March 3d, 1897, now covered by the last clause of section 5297 of the Revised Statutes, authorizing the President, on application by the legislature, or governor if the legislature can not be convened, to use the land and naval forces to suppress an insurrection in any State against its government.

The act of 1897 provided: "That in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual State or Territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the prerequisites of the law in that respect."

And the act of February 28th, 1795, "to provide for calling forth the militia to execute the laws of the Union," etc., provided: "That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State, or States, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose to such officer or officers of the militia as he shall think proper. And in case of an insurrection in any State, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive (when the legislature can not be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.

"And \* \* \* whenever the laws of the United States shall be

opposed, or the execution thereof obstructed, in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the President of the United States, to call forth the militia of such State, or of any other State or States, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the then next session of Congress."<sup>1</sup>

<sup>1</sup> Attorney General Black, in an opinion dated November 20, 1860, and addressed to President Buchanan, said:

"By the act of 1807, you may employ such parts of the land and naval forces as you may judge necessary for the purpose of causing the laws to be duly executed, in all cases where it is lawful to use the militia for the same purpose. By the act of 1795, the militia may be called forth 'whenever the laws of the United States shall be opposed, or the execution thereof obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals.' This imposes upon the President the sole responsibility of deciding whether the exigency has arisen which requires the use of military force, and in proportion to the magnitude of that responsibility will be his care not to overstep the limits of his legal and just authority.

"The laws referred to in the act of 1795 are manifestly those which are administered by the judges and executed by the ministerial officers of the courts for the punishment of crime against the United States, for the protection of rights claimed under the Federal Constitution and laws, and for the enforcement of such obligations as come within the cognizance of the Federal judiciary. To compel obedience to these laws the courts have authority to punish all who obstruct their regular administration, and the marshals and their deputies have the same powers as sheriffs and their deputies in the several States in executing the laws of the States. These are the ordinary means provided for the execution of the laws, and the whole spirit of our system is opposed to the employment of any other, except in cases of extreme necessity, arising out of great and unusual combinations against them. Their agency must continue to be used until their incapacity to cope with the power opposed to them shall be plainly demonstrated. It is only upon clear evidence to that effect that a military force can be called into the field. Even then, its operations must be purely defensive. It can suppress only such combinations as are found directly opposing the laws and obstructing the execution thereof. It can do no more than what might and ought to be done by a civil *posse*, if a civil *posse* could be raised large enough to meet the same opposition. On such occasions especially, the military power must be kept in strict subordination to the civil authority, since it is only in aid of the latter that the former can act at all."

On the 15th of April, 1861, President Lincoln issued a proclamation declaring that the laws of the United States were opposed, and their execution obstructed, in South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law, and calling forth the militia, to the number of 75,000, to suppress said combinations, and to cause the laws to be duly executed.

And on the 3rd of May the President, by an assumption of power not vested in him by the Constitution, issued the following proclamation:

"Whereas existing exigencies demand immediate and adequate measures for the protection of the national Constitution and the preservation of the national Union by the suppression of the insurrectionary combinations now existing in several States for opposing the laws of the Union and obstructing the execution thereof, to which end a military force in addition to that called forth by my proclamation of the fifteenth day of April in the present year, appears to be indispensably necessary—

"Now, therefore, I, Abraham Lincoln, President of the United States, and Commander in Chief of the Army and Navy thereof, and of the militia of the several States when called into actual service, do hereby call into the service of the United



This last section was repealed by act of July 29, 1861, "to provide for the suppression of the rebellion against and resistance to the laws of the United States," etc., in which there was enacted legislation<sup>1</sup> now transferred to the Revised Statutes as section 5298, viz:

"Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the

States forty-two thousand and thirty-four volunteers, to serve for the period of three years unless sooner discharged, and to be mustered into service as infantry and cavalry. The proportions of each arm and the details of enrollment and organization will be made known through the Department of War.

"And I also direct that the regular army of the United States be increased by the addition of eight regiments of infantry, one regiment of cavalry, and one regiment of artillery, making altogether a maximum aggregate increase of twenty-two thousand seven hundred and fourteen, officers and enlisted men, the details of which increase will also be made known through the Department of War.

"And I further direct the enlistment for not less than one or more than three years, of eighteen thousand seamen, in addition to the present force, for the naval service of the United States. The details of the enlistment and organization will be made known through the Department of the Navy.

"The call for volunteers, hereby made, and the direction for the increase of the regular army, and for the enlistment of seamen hereby given, together with the plan of organization adopted for the volunteers and for the regular forces hereby authorized, will be submitted to Congress as soon as assembled.

"In the meantime I earnestly invoke the cooperation of all good citizens in the measures hereby adopted, for the effectual suppression of unlawful violence, for the impartial enforcement of constitutional laws, and for the speediest possible restoration of peace and order, and, with these, of happiness and prosperity throughout the country."

<sup>1</sup>The following extract from a speech of Stephen A. Douglas, delivered in the Senate, March 15th, 1861, explains the necessity for this legislation: for if Stephen A. Douglas's view was correct, the President stood sorely in need of further power:

"But we are told that the President is going to enforce the laws in the seceded States. How? By calling out the militia and using the Army and Navy! These terms are used as freely and as flippantly as if we were in a military Government where martial law was the only rule of action, and the will of the monarch was the only law to the subject. Sir, the President can not use the Army, or the Navy, or the militia, for any purpose not authorized by law; and then he must do it in the manner, and only in the manner, prescribed by law. What is that? If there be an insurrection in any State against the laws and authorities thereof, the President can use the military to put it down only when called upon by the State legislature, if it be in session, or, if it can not be convened, by the governor. He can not interfere except when requested. If, on the contrary, the insurrection be against the laws of the United States instead of a State, then the President can use the military only as a *posse comitatus* in aid of the marshal in such cases as are so extreme that judicial authority and the power of the marshal can not put down the obstruction. The military can not be used in any case whatever except in aid of civil process to assist the marshal to execute a writ. I shall not quote the laws upon this subject; but if gentlemen will refer to the acts of 1795 and 1807, they will find that under the act of 1795 the militia only could be called out to aid in the enforcement of the laws when resisted to such an extent that the marshal could not overcome the obstruction. By the act of 1807, the President is authorized to use the Army and Navy to aid in enforcing the laws in all cases where it was before lawful to use the militia. Hence the military power, no matter whether Navy, regulars, volunteers, or militia, can be used only in aid of the civil authorities.

"Now, sir, how are you going to create a case in one of these seceded States where the President would be authorized to call out the military? You must first procure a writ from the judge describing the crime; you must place that in the hands of the marshal, and he must meet such obstructions as render it impossible for him to execute it, and then, and not till then, can you call upon the military."

judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."

Of the legislation intended to invest the President with authority to make use of the Army in the execution of the laws this is the most frequently appealed to. In 1878, after the passage of the legislation of that year, above cited, Attorney General Devens gave his opinion that under section 5298 the President might use the Army to suppress "organized, armed and fortified resistance to the collection of internal revenue in Baxter County, Arkansas;"<sup>1</sup> and in the same year the President issued his proclamation warning all persons in the Territory of New Mexico to desist from the obstruction of the laws of the United States, which by reason of unlawful assemblages and combinations of persons in arms it had become impracticable to enforce by the ordinary course of judicial proceedings—such proclamation being by law required before the military forces could be used.

In 1882, it appearing that the enforcement of the laws in the Territory of Arizona was "obstructed and resisted to such a degree by powerful combinations of outlaws and criminals, with whom even some of the local officers are alleged to be in league, that a state of lawlessness bordering on anarchy may be said to prevail," Attorney General Brewster held that the contingency was amply provided for by section 5298.<sup>2</sup>

In 1889, Attorney General Miller, in an opinion relating to resistance to the enforcement of the laws in Indian Territory, said that it was certainly competent for the President, under section 5298, to direct the military forces to render such aid to the marshal, upon his request, as might be necessary to enable him to maintain the peace and enforce the laws of the United States in the Territory.<sup>3</sup>

In 1892, the President issued a proclamation declaring that by reason of unlawful obstructions, combinations, and assemblages of persons, it had become impracticable to enforce by the ordinary course of judicial proceedings the laws of the United States within the District of Wyoming, the United States marshal being unable to execute the

<sup>1</sup> 16 Opin. Atty. Gen., 162.

<sup>2</sup> 17 *id.*, 333.

<sup>3</sup> 10 *id.*, 293.

process of the courts, and commanding all persons engaged in resistance to the laws and the process of the United States courts to disperse.<sup>1</sup>

On the 8th of July, 1894, the President issued the following proclamation:

"Whereas, by reason of unlawful obstructions, combinations and assemblages of persons, it has become impracticable in the judgment of the President to enforce by the ordinary course of judicial proceedings, the laws of the United States within the State of Illinois and especially in the city of Chicago within said State:

"And, whereas, for the purpose of enforcing the faithful execution of the laws of the United States and protecting its property and removing obstructions to the United States mails in the State and city aforesaid, the President has employed a part of the military forces of the United States;

"Now, therefore, I, Grover Cleveland, President of the United States, do hereby admonish all good citizens and all persons who may be or may come within the city and State aforesaid, against aiding, countenancing, encouraging, or taking any part in such unlawful obstructions, combinations and assemblages; and I hereby warn all persons engaged in or in any way connected with such unlawful obstructions, combinations and assemblages to disperse and retire peaceably to their respective abodes on or before twelve o'clock noon on the ninth day of July instant.

"Those who disregard this warning and persist in taking part with a riotous mob in forcibly resisting and obstructing the execution of the laws of the United States, or interfering with the functions of the Government or destroying or attempting to destroy the property belonging to the United States or under its protection, can not be regarded otherwise than as public enemies.

"Troops employed against such a riotous mob, will act with all the moderation and forbearance consistent with the accomplishment of the desired end; but the stern necessities that confront them will not with certainty permit discrimination between guilty participants and those who are mingled with them from curiosity and without criminal intent. The only safe course therefore for those not actually unlawfully participating is to abide at their homes, or at least not to be found in the neighborhood of riotous assemblages.

"While there will be no hesitation or vacillation in the decisive treatment of the guilty, this warning is especially intended to protect and save the innocent."

And on the 9th of July the President issued the following proclamation:

"Whereas, by reason of unlawful obstructions, combinations and assemblages of persons, it has become impracticable in the judgment of the President, to enforce by the ordinary course of judicial proceedings the laws of the United States at certain points and places within the States of North Dakota, Montana, Idaho, Washington, Wyoming,

<sup>1</sup> See Winthrop's Military Law and Precedents, p. 1351.

Colorado, and California and the Territories of Utah and New Mexico, and especially along the lines of such railways traversing said States and Territories as are military roads and post routes and are engaged in interstate commerce and in carrying United States mails:

"And, whereas, for the purpose of enforcing the faithful execution of the laws of the United States, and protecting property belonging to the United States or under its protection, and of preventing obstructions of the United States mails and of commerce between the States and Territories, and of securing to the United States the right guaranteed by law to the use of such roads for postal, military, naval, and other government service, the President has employed a part of the military forces of the United States;

"Now, therefore, I, Grover Cleveland, President of the United States, do hereby command all persons engaged in, or in any way connected with such unlawful obstructions, combinations and assemblages, to disperse and retire peaceably to their respective abodes on or before 3 o'clock in the afternoon, on the tenth day of July instant."

It deserves notice that, as appears by the proclamation of July 8th itself, the military forces were called into use before the proclamation was issued. Whenever, in the judgment of the President, it becomes necessary to use the military forces under the title of the Revised Statutes to which section 5298 belongs, he is required, by section 5300, to issue his proclamation commanding the insurgents to disperse and retire peaceably to their respective abodes within a limited time. But it might be that the object of the employment of troops would not be the dispersal of insurgents but the overcoming and arrest of persons violating and defying the laws and judicial proceedings of the United States, or the protection of the instrumentalities of the United States, such as its treasury or mails, and that the immediate use of the troops would be necessary. This suggests the important question whether there is not authority for the use of the Army in the execution of the laws other than that which is derived from the Constitution through the medium of statutes.<sup>1</sup>

<sup>1</sup>The different acts of legislation authorizing the employment of troops in the enforcement of the laws are given in the Army regulations (Article LII). See also Davis's Military Laws, Chapter XXXVIII, and Winthrop's Military Law and Precedents, page 1347, *et seq.*

The act of 1878 and the constitutional and statutory provisions understood to be excepted from its prohibition were published to the Army in a general order from the headquarters of the Army, a provision of which required that applications for the use of troops should be forwarded for the action of the President. This was subsequently modified by the War Department in the following instructions to General Ord.

"In an emergency a commander is authorized to disregard the long communications through intermediate channels, and may telegraph direct to the Adjutant General.

The *posse comitatus* law is not supposed to apply to repelling invasions of foreigners against United States territory, nor to protection of United States property against violence. As a citizen may defend his house against a robber, so the United States may defend its treasury, mails, etc., against lawless violence."

To which General Ord added:

"As it is impossible to protect United States property without protecting the offi-



The Constitution of the United States requires that—

"The United States shall guarantee to every State<sup>1</sup> in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence."

There are here three guaranties—the guaranty of a republican form of government, the guaranty against invasion, and the guaranty against domestic violence. It is important to keep this in mind in considering who is meant by the United States, because it seems to have been too readily assumed that, with reference to each of these guaranties, "The United States" means Congress only, and that therefore Congress must give life to each of them by legislation. In the case of *Texas v. White*,<sup>2</sup> the Supreme Court held with reference to the government set up by the executive department in Texas after the rebellion, and speaking of the guaranty clause of the Constitution, as follows:

"It is not important to review at length the measures which have been taken, under this power, by the executive and legislative departments of the National Government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smoldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for

cers in charge, in the view of the department commander the preceding paragraph authorizes the protection of an officer of the United States, civil or military, from violence by lawless bands, while in the execution of his office." (Circular No. 18, 1878, Department of Texas.)

In 1879, two officers of the Army were indicted in Texas for assisting the United States marshal with troops in arresting persons for violations of the revenue laws.

The word "State" as used here has been construed to include an organized Territory. At the time of the violent disorders in New Mexico, in 1878, the governor of the Territory applied to the President for protection, but the proclamation which was issued by the President shows that the use of troops was not based on this guaranty, but on the power given him by the statute to use the land and naval forces to enforce the execution of the laws of the United States, when by reason of unlawful obstructions, combinations or assemblages of persons, or rebellion against the authority of the Government of the United States, it becomes impracticable to enforce the laws of the United States within any State or Territory by the ordinary course of judicial proceedings. It was at that time held that the word "State," as used in the guaranty clause, does not include a "Territory," but this view has not since then been adhered to. Thus, President Cleveland, on the 7th of November 1880, issued his proclamation on the representation of the governor of the Territory of Washington that domestic violence existed in that Territory, etc. and on the 9th of February, 1886, he issued a similar proclamation, also on the application of the governor of the Territory of Washington. So, also, the governor of the Territory of Wyoming, having in 1885 telegraphed to the Secretary of War with reference to the brutal attack on the Chinese employed as miners by the Union Pacific Railway Company that the county authorities were powerless, that the Territory had no militia, and that he had applied to General Howard, at Omaha, for military aid, he was informed that before it could be given he must make application to the President in the manner indicated in the Constitution.

The President in these cases evidently based his action on a construction of the word "State" sufficiently broad to include inchoate States or organized Territories.

See also Paschal's Ann. Const., p. 242.

<sup>1</sup> 7 Wallace, 700, 729.

the State, and providing for the assembling of a convention, with a view to the reestablishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

"Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it can not be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

"But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. 'Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not.'

"This is the language of the late Chief Justice, speaking for this Court, in a case from Rhode Island,<sup>1</sup> arising from the organization of opposing governments in that State. And, we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

"The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress."

The period to which this decision relates was not one of normal conditions. It was a period following a war. And the locality to which it relates had been a State in rebellion. Under these circumstances, the immediate restoration of the Constitution to its full force was, doubtless, impossible. The power exercised by the President might, therefore, be justified on the ground of necessity—the necessity of establishing some temporary government—and this seems to have been in the minds of the Supreme Court. But their decision does not go to

<sup>1</sup> *Luther v. Borden*, 7 Howard, 42.

the extent of saying that under other conditions the President would not, in the absence of any action by Congress, have had devolved upon him a duty under the guaranty clause of the Constitution. That "the power to carry into effect the clause of guaranty is primarily a legislative power" is not questioned, but that "The United States," as that designation is used in the guaranty clause, means Congress only, and can never under any circumstances mean the President, is believed to be a quite untenable position, and does not seem to have been intended by the Supreme Court. The fact that the power is vested primarily in Congress is not equivalent to saying that it is vested exclusively there, and that therefore the President can have no power under this clause of the Constitution, even though Congress should fail to legislate.

Moreover, the Supreme Court, in the case of *Texas v. White*, was discussing the power of the President only as to one of the three guaranties—the guaranty of a republican form of government, and if we were to construe the language of the court to mean that Congress alone has jurisdiction, it would become a question whether we should apply the same principle to the guaranty against invasion and domestic violence. These three guaranties are in the same clause, and "The United States" are required to furnish them all. But it can not be said, nor would it be practicable, nor as to the guaranty against domestic violence historically true, that the guaranties against invasion and domestic violence are exclusively in the hands of Congress. To hold that would be to destroy the value of these guaranties. They are not limited in time to the sessions of Congress, but are intended to be effective at all times. Who, then, is to furnish the guaranty when Congress is not in session?

And, further, the power to furnish the protection guaranteed involves the power to command, which the President, as commander-in-chief, has over the military forces. Congress can not exercise this power, and therefore, in order that it shall be exercised, "The United States" must be held to apply to the President, as well as to Congress.

In the case of *Luther v. Borden*<sup>1</sup> it was said that it is not a judicial, but a political, question whether a certain government is the duly constituted government of a State, and that under the guaranty clause of the Constitution it rests with Congress to decide what government is the established one in a State, and that as to that part of the clause which relates to domestic violence it also rests with Congress to determine upon the means proper to be adopted to fulfill the guaranty. It was held to be a political and not a judicial power. Congress might,

<sup>1</sup> 7 Howard, 1.

it was said, if it had deemed it advisable, have placed it in the power of a court to decide when the contingency had happened which required the Federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that "in case of any insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature can not be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."—thus giving to the President the power to decide whether the exigency has arisen upon which the Government of the United States is bound to interfere.

There was no question in this case as to whether, in the absence of any action by Congress, a duty might not under the guaranty clause devolve on the President. As one of the ways in which a republican government, once established in a State, may be endangered or set aside, Judge Cooley mentions the hostile action of some foreign power in taking military possession of the territory of the State and setting up some government therein not established by the people themselves. And in this connection it is to be remembered that the second guaranty is against invasion. But Congress has not authorized the President to employ the Army in repelling invasion. It has authorized him to call forth the militia, but has remained silent as to the Army. Can it be for any other reason than that he already has the power? Would it not have been an absurdity for Congress to have given the commander-in-chief of the Army permission to use it to repel invasion?

By the Constitution, said Mr. Justice Grier, in the *Prize Cases* (2 Black., 635), Congress alone has the power to declare a national or foreign war. It cannot declare war against a State or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to

"If, indeed, the use of the Army were to be limited to such purposes as might be designated by Congress, it would be a contemptibly impotent force, for it would be impossible for Congress to foresee all the conditions which might call for its use. But Congress has not attempted to do this. The every-day use of the Army is not even regulated by Congress, although this might, however imperfectly, be done by legislation. It has been wisely left to the control of the commander-in-chief. If the use of the Army were absolutely dependent on the designation by Congress of the purposes for which it may be employed, it could not even protect all the property of the United States under its charge, for Congress has not made it its duty to do so, except in certain special cases. But, to create an army is to create it for the ordinary purposes for which armies are used, and the power of the President as commander-in-chief to use it for such purposes can not be questioned. The object of the legislation of 1878 was to place restrictions on the use of the Army in 'executing the laws,' but this had reference only to the ordinary civil and criminal laws of the land. It was not intended to place any restriction on its use for ordinary military purposes. The Army is all the time used for purposes not prescribed by Congress, and the President is doing this by virtue of his power as commander-in-chief.



take care that the laws be faithfully executed. He is commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations,<sup>1</sup> and to suppress insurrections against the government of a State or of the United States. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral*." Lord Stowell (1 Dodson, 247) observes: "It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other." The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13th, 1846, which recognized "*a state of war as existing by the act of the republic of Mexico*." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress.

Under the Constitution the legislative and executive branches of the Government sometimes have the power to act in the same subject-matter. This was discussed in remarks, elsewhere made,<sup>2</sup> on the source of authority of the Army Regulations, with reference to which it was pointed out that, although Congress, under its power "to make rules for the government and regulation of the land and naval forces," has primarily the authority to cover the whole field of army regulations, yet, subject to this power, the President, as commander-in-chief, has a jurisdiction over the same subject-matter as repeatedly recognized by the Supreme Court. So that, in the absence of legislation regulating any matter of army administration, the President's power is effective. The guaranty clause makes it the duty of the United

<sup>1</sup> This, however, is a mistake. The legislation of 1795 related only to calling out the militia, and that of 1807, which did provide for the employment of the land and naval forces, made no mention of repelling invasion, but provided only for the suppression of insurrection and obstruction to the law.

<sup>2</sup> Remarks on the Army Regulations and Executive Regulations in General, p. 703, *ante*.

States to guarantee, not only a republican form of government, but against invasion, and, on the application of the State, against domestic violence. Of course Congress can materially aid, and, to a great extent, control these guaranties by its legislation, but, if it should fail to legislate, would the constitutional obligation of the United States be any the less? And if the President has the actual power to give this constitutional protection, will it not, in case of the failure of Congress to furnish it, rest with him to do so? His power and duty seem clear, but he must of necessity exercise his discretion in determining the existence of the conditions demanding this protection. He can not delegate his discretion to the legislatures or executives of States, and thus become a volitionless instrument in their hands.

But the guaranty clause of the Constitution is not the only constitutional provision which clothes the Executive with the power to use force in the execution of law. If his power were limited to what this clause empowers the Federal government to do, it would be inadequate for some of the purposes for which it may be required. It is a guaranty to the States of a republican form of government and against invasion and domestic violence, but it does not vest the Federal executive with the power to enforce the laws of the United States. This power, if it exists at all as a power derived directly from the Constitution, must be found elsewhere in that instrument. By the Constitution, the "executive power is vested in a President of the United States of America," whose duty it is made to "take care that the laws be faithfully executed." Can it be said that the duty thus imposed is lifeless, without the help of Congress, because the Constitution has not given him a corresponding power?

In the *Neagle case*<sup>1</sup> the Supreme Court say:

"The Constitution, section 3, Article II, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the Army and Navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to

<sup>1</sup>135 U. S., 1.

fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'

"Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?"

And, illustrating these remarks, the Supreme Court refer to the *Martin Koszta* case and ask, Upon what act of Congress then existing can anyone lay his finger in support of the action of our Government in this matter? and, Who can doubt the authority of the President to protect the mail, "whether it be by soldiers of the Army or by marshals of the United States?" and, Has he no power, in the absence of legislation by Congress, of protecting the public lands from depredation?

The court say that they can not doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and that they think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. "That there is," say the court, "a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them."

And in *Ex parte Siebold*,<sup>1</sup> the same court said:

"It is argued that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

The Supreme Court was not here speaking of the President's power

to use the Army in aid of the civil power in the execution of the laws. But, it being his duty to take care that the laws are faithfully executed, does not what the court say lead us to the recognition of his power to resort to the other means which the Constitution has placed in his hands for enforcing obedience to the laws of the United States when the civil power fails? "The power and duty imposed on the President to 'take care that the laws are faithfully executed,' necessarily carries with it all power and authority necessary to accomplish the object sought to be attained."<sup>1</sup> "Where the law directs a thing to be done without saying how, that implies the power to use such means as may be necessary and proper to accomplish the end of the legislature."<sup>2</sup>

In the case of *Logan v. United States*,<sup>3</sup> the Supreme Court held that a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States, has the right to be protected by the United States against lawless violence; that this right is secured to him by the Constitution and the laws of the United States; and that a conspiracy to injure or oppress him in its free exercise or enjoyment is punishable under section 5508 of the Revised Statutes. The court said that every right, created by, arising under, or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object; that in the case at bar, the right in question did not depend upon any of the amendments of the Constitution, but arose out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action; that any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safe-keeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them.

And the court cite the decisions in the *Neagle* and *Siebold* cases, in the former of which, say the court, "it was held that, although there was no express act of Congress authorizing the appointment of a deputy marshal or other officer to attend a justice of this court while traveling in his circuit, and to protect him against assault or injury, it was within the power and duty of the Executive Department to protect a judge of any of the courts of the United States, when there was just reason to believe that he would be in personal danger while executing the duties

<sup>1</sup>U. S. Cir. Court, in the *Neagle* case, 30 Fed. Rep., 835.

<sup>2</sup>Attorney General Black v. Olin, 519.

<sup>3</sup>144 U. S., 263.



of his office;" and in the latter of which cases it was held "to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it."

And, again, the Supreme Court say:

"If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions<sup>1</sup> for such offences had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the National government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

"But there is no such impotency in the National government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its cares. The strong arm of the National government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the Army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

"But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the Army the only instrument by which rights of the public can be enforced and the peace of the nation preserved?"

And Justice Brewer, delivering the opinion of the court, then proceeds to the consideration of the power of the courts to remove or restrain obstructions to the passage of interstate commerce and the carrying of the mails.

So, when the enactment of 1878 was under discussion in the Senate, Mr. Edmunds said: "It is a rather singular statute to pass, to say that the Army of the United States shall not be used for the purpose of executing the laws—that is, of course, the laws of the United States—under any circumstances unless specifically authorized by an act of Congress or the Constitution. Now take the Constitution first; the Constitution says that the President of the United States shall be commander-in-chief of the Army and Navy; it says in the next place that

<sup>1</sup>*In re Delos*, 158 U. S., 581.

he shall take care that the laws are faithfully executed; that is, all laws. Then the question at once arises whether under the Constitution of the United States, saying no more, it being the duty of the President to take care that the laws are faithfully executed and he being commander-in-chief of the Army, the Constitution does not expressly authorize him to use the Army whenever power is lawfully to be required to execute the laws."

And President Cleveland, replying, July 5th, 1894, to Governor Altgeld's protest against his use of United States troops in Chicago, said:

"Federal troops were sent to Chicago in strict accordance with the Constitution and laws of the United States, upon the demand of the Post Office Department that obstruction of the mails should be removed, and upon the representations of the judicial officers of the United States that the process of the Federal courts could not be executed through the ordinary means, and upon competent proof that conspiracies existed against commerce between the States. To meet these conditions, which are clearly within the province of Federal authority, the presence of Federal troops in the city of Chicago was deemed not only proper, but necessary, and there has been no intention of thereby interfering with the plain duty of the local authorities to preserve the peace of the city."

The course pursued at this time, under instructions from the Attorney General, was to file a bill in equity for an injunction against any combination in restraint of interstate commerce, or interference with the performance of the duties of railroads as common carriers under the interstate commerce act, or conspiracy to obstruct or retard the passage of United States mails or the operation of the regular trains carrying them, that might exist, and, when such restraining order was not enforceable by the marshal in the ordinary manner, to enforce it by the military power of the Government, on certification of the facts to the authorities at Washington. Troops, when thus used, were not under the marshal, nor a part of the marshal's force or posse, but were a substitute therefor, and were under the command of the military officer in charge, to be used for the purposes named.<sup>1</sup>

But it may happen that the use of troops will be required in anticipation of forcible resistance to the law, which, if it should reach that stage, they might be employed in putting down. Their mere presence, for the purpose of overawing the lawless and preventing the commission of the unlawful act, may be very desirable. It is, of course, better to prevent the crime than to wait until it is committed and

<sup>1</sup>See correspondence relative to the Chicago disorders, published as an Appendix to the Annual Report of the Attorney General, for 1896. H. R. Doc. No. 9, part 2, 54th Cong., 2d sess., pp. 20, 24, 195, etc.

injury is done. Unquestionably the Government has a right to protect itself in this way. It would, indeed, be absurd to say that although, when the execution of the laws is obstructed by organized resistance too powerful to suppress by the ordinary course of law, the Army may be used in aid of the civil power, nevertheless it may not be used in such a way as, by its presence, to render unnecessary a resort to force against lawbreakers. Is the Government so impotent that it must wait for the crime to be committed, its instrumentalities obstructed, its property destroyed, before it can act? May it not protect its instrumentalities and property against a threatened danger, by the simple presence of the military power? It has often happened that the presence of a military force has had this effect, and it does not seem possible to doubt that it may lawfully be used for such purpose. We are not here speaking of its active use in aid of any civil process, but simply of the protection which the mere fact of its presence gives to instrumentalities and property of the United States which the United States has the right to protect. This right of protecting by the presence of troops undoubtedly exists, equally with the right to use active force when the resistance to the law makes it necessary. It is an exercise of the same power—the power to take care that the laws are faithfully executed—which the Supreme Court recognized in the *Neagle* case as authorizing the use of means, not expressly provided by statute, for the protection of its justices traveling on circuit. The power to use the Army to give protection by its presence is, indeed, inseparable from the power to protect by active force. It would not exist without the latter.

In a recent (1897) case troops were used at the Tongue River Indian Agency in Montana, for the purpose of escorting a sheriff with an Indian prisoner, charged with murder, from the agency to the railway, some distance off, there being reason to fear that the settlers in the neighborhood would take him from the sheriff and lynch him. This was done by the military commander on the spot, without any express authority for such use of the troops. It was a case where the presence of the troops, or a show of force, was used to protect a prisoner, who had surrendered to the military authority and had been transferred to the civil authority, against a great danger, and until it was past. Who will say that the military commander exceeded his authority?<sup>1</sup>

<sup>1</sup> The Army Regulations prescribe that, if time will admit, applications for the use of troops must be forwarded for the consideration and action of the President, but in case of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in case of attempted or threatened robbery or interruption of the United States mails, or other equivalent emergency so imminent as to render it dangerous to await instructions requested through the speediest means of communication, an officer of the Army may take such action before the receipt of instructions as the circumstances of the case and the law under which he is acting may justify.

It was at one time suggested to the Attorney General that if the mob in Chicago should again seriously interfere and prevent the enforcement of the United States laws, martial law should be proclaimed. But he, evidently, did not believe that this could be done under the existing circumstances, although he seems to have been of the opinion that the United States could proclaim martial law if the governor of Illinois should invoke Federal aid and thus put the United States in complete control of the situation.<sup>1</sup> "Martial law," however, is not anything that is provided for by the Constitution. It is founded in necessity, attendant on the fact of war. When opposition to the laws of the United States amounts to war, there will be a justification for martial law in the locality of the war or where it is necessary. But when the opposition falls short of war, the use of the military power under the authority of the Constitution and the laws would be limited, as it was in 1894, to the purpose of removing the particular obstruction which has sprung up, and enforcing the laws obstructed. "Martial law" means much more than this. When martial law prevails, the civil power is superseded by the military power; the military power becomes supreme; the safeguards of the Bill of Rights of the Constitution are for the time being set aside; and the civilian may be tried by military commission. This would not be the military power acting in aid of the civil power. Nor would the conditions existing in 1894 have been a justification for it. Only a condition of war would be. "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice can not be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."<sup>2</sup> But when the military power is acting under the Constitution in aid of the civil power, and the opposition to the law is not of such a character that war exists, the civil power is still supreme, and the rule of war can not be applied.<sup>3</sup>

<sup>1</sup> See page 77 of the publication named in note 1, p. 784, *ante*.

<sup>2</sup> The Prize Cases, 2 Black 668, *Ex parte Milligan*, 4 Wall. 2; also North American Review, November, 1896, on The Justification of Martial Law.

<sup>3</sup> But, although the rule of war can not be applied so as to displace the civil power under such circumstances, these circumstances may give rise to emergencies justifying an exercise of power for which there would otherwise be no justification. When the Pennsylvania militia were called out in 1892 for the suppression of the Homestead riots, the understanding between the sheriff and the commander of the troops was that the troops would support the sheriff in the nature of a *posse comitatus* but the commander was to retain command of them, to employ military methods in putting down opposition to the sheriff, and to use them in his own way; and he reserved to himself full liberty, subject to the approval of the commander-in-chief, to take such action in cases of emergency as circumstances might warrant. (Annual report of Major General Snowden, commanding Division, N. G. P., 1892.)

In the charge of the Chief Justice of Pennsylvania to the jury in the case of *Com. v. Hawkins and Streater*, generally spoken of as the Iams case (Iams being a militia-



Remarking on a passage in Russell on Crimes, where it is said that for private persons to make use of arms in suppressing riots would seem only proper against such riots as "savour of rebellion," Finlan-

man who had been punished without trial, on account of an exclamation he had made showing his sympathy with the rioters, and had thereupon prosecuted the military officers who had caused him to be so punished, he held that, under the circumstances, the relation between the officers and the soldiers under their command "were governed by the same rules that would prevail in case of actual war," the only difference being one arising out of the difference in surroundings, and which in the case at bar made it the duty of the jury to determine whether the officers ordering the punishment were actuated by improper motives, but that the jury had nothing to do with the question whether war actually existed between the armed body and the inhabitants surrounding them. The trial resulted in the acquittal of the defendants.

Commenting on this case, the commanding general of the Pennsylvania militia remarked, in his annual report for 1892, that, while it had been hoped that the court would affirm a plea to the jurisdiction, the result was highly satisfactory, since a full trial in open court showed the features of the case to have been greatly exaggerated in the community, and resulted in a verdict of acquittal at the hands of a jury of the county, and "the law as laid down justifies an officer in an emergency, in time of riot or rebellion, actual war, as this was, in using extreme measures to preserve discipline, when not actuated by malice but honestly exercising a conscientious judgment."

The facts in the *Lums* case would, under conditions admitting of a calmer examination, perhaps not have been held to create an emergency justifying the action taken, and the statement that the troops "were governed by the same rules that would prevail in case of actual war" seems to be an unnecessary view to take of the matter, and may be a misleading one. But that such conditions may produce emergencies justifying what would otherwise be arbitrary can scarcely be doubted.

The instructions given for the use of troops in certain localities in Alaska, in 1898, seem to be based on this principle. Instructions, of date, February 9, were as follows: "The troops are sent to the localities named in the interest of good order, and of the safety of the persons and property there and in the vicinity of those places, which the troops are expected to conserve. The force should be used with kindness and consideration and within the measure of the strict necessity of the occasions as they may arise. The President relies upon the firmness and wise discretion of the officers in command to accomplish the objects for which the troops are sent, with kindness and humanity, and the use of their forces lawfully and as little as is compatible with the duties assigned them."

Other instructions, of date March 19, were as follows: "The Secretary of War has information that a mob has taken possession of the White Pass road built by George A. Brackett, of Minneapolis, and others. He desires that their rights be protected and mob violence suppressed."

The parts of Alaska where the troops were to be used being unprotected by an organized local civil government, it was evidently deemed necessary, in order that the localities named should not be handed over to lawlessness, that the government having jurisdiction over the territory should use the only means at its disposal to prevent the commission of crime. It must be regarded as a temporary measure, based on necessity, to which the legislation of 1878 was not applied.

The remarks of Mr. Justice Woodbury, in his dissenting opinion in the case of *Luther v. Borden*, Howard, 78:83, are of interest in this connection.

At the time of the riots in Idaho, in 1892, the governor applied to the President for the protection guaranteed by the Constitution, and also issued a proclamation declaring the county, which was the locality of the trouble, to be in a state of insurrection and rebellion. Military aid was furnished by the President, and for a time the locality was under predominant military rule, although the civil power was not in fact entirely displaced. It was regarded as an enforcement of martial law, based on the fact, proclaimed by the governor, of the existence of insurrection and rebellion, that is, war. (Similarly in the case of the *Coeur d'Alene Labor Troubles* of 1899, See H. R. Report 1909, 56th Cong., 1st sess.) But when the domestic violence does not amount to insurrection or rebellion, the State's invocation of aid to suppress it

son says that it brings the question to the verge of martial law, and recalls to mind the phrase used by the Attorney General in the case of the Lord George Gordon riots, when he advised the Crown to declare the tumults *rebellious*, in order to allow of the recourse to military force in attacking the rioters wherever they were found, and whether or not engaged in felonious outrage, which alone would justify it at common law. This, says Finlanson, shows the point of contact between the scope of common law and martial law, the one dealing with mere riot, and the other with rebellion so formidable as to amount to war and to require measures of war.<sup>1</sup>

What was advised by the Attorney General on the occasion of the Lord George Gordon riots was actually done by the governor of Idaho, during the riots of 1892, when he, by proclamation, declared a county, where the lawlessness existed, to be in insurrection and rebellion.

Owing, however, to our dual system of government the principles controlling this subject are in a great measure peculiar to this country. With the suppression of ordinary riots, not interfering with the execution of the laws of the United States, nor with the processes of the Federal courts, nor with the mails nor the property<sup>2</sup> of the United

would not justify a resort to martial law. This seems to have been understood and observed during the riots of 1877. Whether the domestic violence does in fact amount to insurrection or rebellion may sometimes be a very delicate and difficult question to decide, although in *Ex parte Milligan* (4 Wall., 127), the Supreme Court declared that martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.

It is correctly reported in the newspapers, General Gobin, the commanding general of the militia sent to Hazleton, Pa., in September, 1897, in consequence of the troubles arising out of the miners' strike, declared that, in spite of the warrants issued for the arrest of the sheriff's deputies for the shooting of miners, no constables, nor any civil authority, would be permitted to arrest them; that the sheriff is an executive officer, whose duty is to preserve the peace, that he, General Gobin, and the troops, were subordinate to the sheriff, being engaged in helping him to perform that duty; and that, under these circumstances, he would not permit interference with the sheriff's officials. "In spite of this fine distinction," wrote the reporter, "the commander's decision on this point is accepted as superseding the civil authorities by the military power." This goes to show the legal difficulties that may arise. A publication on "The Organized Militia of the United States in 1897," by the Military Information Division of the Adjutant General's Office, contains an account of the use of the militia on this occasion.

For an interesting discussion of "The Status of the Militia in Time of Riot" see two articles on that subject in the Albany Law Journal of August 3d and 10th, 1878, by William M. Ivins.

A majority of the States have express provisions in their constitutions or statutes for calling out the militia "to execute the laws," in others the power is given, although not in this specific language, some copying the Constitution of the United States in this respect, making the executive commander-in-chief, and requiring him "to take care that the laws be faithfully executed."

<sup>1</sup> Review of the Authorities as to the Repression of Riot or Rebellion, by W. F. Finlanson, p. 25.

<sup>2</sup> "Your right to take such measures as may seem to be necessary for the protection of the public property is very clear. \* \* \* The right of defending the public property includes also the right of recapture after it has been unlawfully taken by another." (Attorney General Black to President Buchanan, 9 Opin., 520, 521.)

States, or, in general, with their instrumentalities of government; the Federal government has in the first instance nothing to do. It is only when called on in the manner prescribed by the Constitution that it can interpose its power for the suppression of such domestic violence.

As at Chicago, the existence of the two governments, Federal and

<sup>1</sup> In a letter to the Secretary of War, dated July 5th, 1864, the Attorney General said:

"I have the honor to acknowledge the receipt of copy of telegram to the Adjutant General of the United States Army, from Brigadier General Merritt, commanding the Department of the Dakota. The telegram shows that on the Northern Pacific Railroad, west of Fargo, no trains are running, that employees engaged by the company refuse to work unless adequate protection is afforded them, that the protection of the United States courts as now afforded does not, in the opinion of such employees, secure them against danger, and that in consequence of the circumstances above mentioned mail communication with Forts Keogh and Custer has been interrupted since June 25, and the commanding general is unable to make the usual bimonthly payments to his troops or to ship supplies to the military posts on the line of the Northern Pacific.

"By section 3 of the act of July 2, 1864 (13 Stat., 365), incorporating the Northern Pacific Railroad Company, it is declared that certain described public lands are granted to the company 'for the purpose of aiding in the construction of such railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, and munitions of war, and public stores over the route of said line of railway.'

"By section 11 it is further enacted, 'That such Northern Pacific Railroad, or any part thereof, shall be a post route and a military road subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.'

"By section 20 of the same act Congress reserves the right to alter, amend, or repeal the act 'the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of such railroad and telegraph line and keeping the same in working order and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes.'

"These provisions make the road of the Northern Pacific a military road of the United States. Being such, the power of the President, as commander-in-chief of the military forces of the United States, to keep the road unobstructed and available for military purposes can not be doubted, and may properly be used to remedy the mischief stated in General Merritt's telegram."

And the following letter was sent by the commanding general of the Army to the commanding general of the Department of the Columbia:

"In view of the fact, as substantiated by communications received from the Department of Justice, from military official reports, and from other reliable sources, that, by reason of unlawful obstructions and combinations or assemblages of persons, it has become impracticable, in the judgment of the President, to enforce by the ordinary course of judicial proceedings the laws of the United States and to prevent obstructions of the United States mails and interruptions to commerce between the States, the right guaranteed by section 11 of the act approved July 2, 1864, constituting the Northern Pacific Railroad 'a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service' you are directed by the President to employ the military force under your command to remove obstructions to the mails and to execute any orders of the United States court for the protection of property in the hands of receivers appointed by such court, and for preventing interruption of interstate commerce, and to give such protection to said railroad as will prevent any unlawful and forcible obstruction to the regular and orderly operation of said road 'for postal, military, naval, and all other Government service.'"

Similar letters were sent to the commanding generals of the Departments of the Platte and of California for the protection of the Union Pacific and Central Pacific Railways. H. R. Doc., No. 9, part 2, 54th Cong., 2d sess., pp. 226, 233.

State, may lead to complications, under such conditions. The Federal military power, employed in aid of the Federal civil power, may find itself acting within a State contrary to the wishes of the State's executive. But that can only happen when the State's executive fails to recognize the fact that the Federal authority extends to every part of the United States, just as the State's authority extends to every part of the State, and that wherever in the United States the authority of the laws of the United States is resisted, to such place does their authority to enforce their laws extend. The United States have as full jurisdiction within a State for the execution of their laws, as the State has for the execution of its own. They are not there by sufferance, or comity, but as a constitutional right.<sup>1</sup> And if the resistance to the laws be of such a character that it can not be overcome in the ordinary way, the Federal executive has as much right to use the Federal military power to subdue it, as the State's executive has to use the military power of the State to subdue a similar resistance to its own laws.

The President's use of the Army in the execution of the laws on the occasion of the Chicago strikes was commended by both the Senate and House of Representatives, in resolutions adopted by those bodies. The Senate resolution declared, "That the Senate indorses the prompt and vigorous measures adopted by the President of the United States and the members of his Administration to repulse and repress, by military force, the interference of lawless men with the due process of the laws of the United States, and with the transportation of the mails of the United States, and with commerce among the States.

"The action of the President and his Administration has the full sympathy and support of the law-abiding masses of the people of the United States, and he will be supported by all departments of the Government and by the power and resources of the entire nation."

And the resolution of the House of Representatives was as follows: "*Resolved*, That the House of Representatives indorses the prompt and vigorous efforts of the President and his Administration to suppress lawlessness, restore order, and prevent improper interference with the enforcement of the laws of the United States, and with the transportation of the mails of the United States and with interstate commerce; and pledges the President hearty support, and deems the success that has already attended his efforts as cause for public and general congratulation."

These were very important regulations, indicating, as they do, the understanding at that time of the two Houses of Congress with refer-

<sup>1</sup> *Ex parte Siebold*, 100 U. S., 394.



ence to the power of the President to use the military forces of the United States in the execution of the laws; although the understanding probably was that their use was pursuant to the statutory authority contained in the Revised Statutes. There was no question as to the source of the authority.

This use of Federal troops was, however, also in accord with the views of the Supreme Court in the *Neagle* case, as to the power of the President. Or, as it has been elsewhere expressed: "The President is, of course, to take care that the laws are faithfully executed. But how? By what means? Only by such means as the Constitution and laws themselves have given him power to employ. That is, by causing proceedings to be instituted according to law, against those who violate the law, and by employing whatever force may be necessary to overcome all resistance that is offered to their execution."<sup>1</sup>

The President's constitutional duty to take care that the laws are faithfully executed must be carried out by the means placed in his hands by or under the Constitution. If Congress does not prescribe means, he must use such means as the Constitution supplies him with. These means are not specifically set forth in the Constitution. They are incidental to and implied in his general powers. Nor is such a conclusion unauthorized by the character of the instrument. In the language of Chief Justice Marshall, "A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language."<sup>2</sup>

By the last clause of the legislation of 1878 it was prescribed that no money "appropriated by this act" should be used to pay the expenses incurred in the employment of any troops in violation of it. This provision related, of course, only to the period covered by the appropriation act in which it is found. Congress may, by disbanding the Army, render it impossible for the President to resort to his constitutional power as executive and commander-in-chief of employing the Army in aid of the civil power, in the execution of the laws, or

<sup>1</sup> *Paine, J., In re Kemp*, 16 Wis. 414. See also *Story, Const.* secs. 1489-1493, and *Kent's Commentaries*, vol. 1, p. 282.

<sup>2</sup> *McCulloch v. Md.*, 4 W., 407.

may couple an appropriation for the support of the Army with a condition as to the use of the money appropriated; but, if it be true that the Constitution directly vests the President with the duty and power we have been discussing, it must follow that Congress can not make the exercise of such power illegal. It may prevent its exercise, but it can not make it illegal.

The framers of the Constitution relied on the control of Congress over appropriations as the great safeguard against a misuse of the Army. It was believed that to refuse to vote supplies would be to disband the Army. We have seen that for a short time the Army has been maintained without such vote. But, nevertheless, this was the safeguard relied on, and there was no attempt to create another by investing Congress with direct control over the President in the discharge of his constitutional duty to take care that the laws be faithfully executed.

There is not now any fear of an abuse of this power. In the early days of our history a "standing army" was regarded with fear. It was natural that the framers of the Constitution, with their knowledge of the past and anxiety for the future, should have this fear. But, with our experience, is it reasonable? What fair-minded man can

<sup>1</sup> Mr. Justice Miller, in his Lectures on the Constitution, says that the belief, which was entertained by some at the time of the adoption of the Constitution, that there was danger in the great power vested in the Executive, though natural enough at the time, was a very great mistake; that the nearer we approach to individual responsibility in the Executive the nearer will it come to perfection, that of the three branches, the executive has been the most shorn of the powers granted it by the Constitution; and that of all the delusive ideas, or fallacies, that ever entered anybody's brain, the most unfounded is this—that any President can ever make himself a perpetual dictator, either in our time or generation or in those which are to come.

See also Foster's Commentaries on the Constitution, page 242, *et seq.*

A most remarkable encroachment on the constitutional powers of the President was the legislation contained in the second section of the Army Appropriation Act, of March 2, 1867, whereby it was prescribed:

"That the headquarters of the General of the Army of the United States shall be at the city of Washington, and all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and, in case of his inability, through the next in rank. The General of the Army shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate; and any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void, and any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdemeanor in office, and any officer of the Army who shall transmit, convey, or obey any orders or instructions so issued contrary to the provisions of this section, knowing that such orders were so issued, shall be liable to imprisonment for not less than two nor more than twenty years, upon conviction thereof in any court of competent jurisdiction."

This provision, although, as the President declared, it deprived him of his constitutional functions as commander-in-chief of the Army, he was compelled to countenance, or otherwise, by withholding his signature from the act, defeat necessary appropriations. But, while thus sanctioning it, he did not quietly submit to it. Thus we find him, by proclamation of September 3d, 1867, declaring that "all officers of

now say that our standing Army is a menace, instead of a protection, to our institutions? Is not what Macaulay wrote applicable in substance to our condition also? "It was proved by experience that, in a well-constituted society, professional soldiers may be \* \* \* submissive to the civil power. \* \* \* It is perhaps because the army became thus gradually, and almost imperceptibly, one of the institutions of England, that it has acted in such perfect harmony with all her other institutions, has never once, during a hundred and sixty years, been untrue to the throne or disobedient to the law, has never once defied the tribunals or overawed the constituent bodies."

Such a spirit our Army has inherited. It has never questioned its subordination to the civil power in time of peace; but, on the contrary, it has been taught, in the language of the Army Regulations of 1825 (prepared by General Scott), that, "Respect and obedience to the civil authorities of the land, is the duty of all citizens, and more particularly of those who are armed in the public service."<sup>1</sup>

If there was reason for the legislation of 1878, in the use to which the Army had then been put by the Executive, it threatens us with no danger, because the conditions can not recur.

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the Army \* \* \* of the United States, in accepting their commissions under the laws of Congress and the rules and articles of war, incur an obligation to observe, obey, and follow such directions as they shall from time to time receive from the President or the General, or other superior officers set over them, according to the rules and discipline of war," and enjoining upon officers of the Army directly, and not through the medium of the commanding general of the Army, to assist and sustain the courts and other civil authorities of the United States in a faithful administration of the laws thereof, and in the judgments, decrees, mandates and processes of the courts of the United States. The legislation was repealed in 1870.

<sup>1</sup> See also the Army Regulations of 1847.





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